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DEDICATION OF SACRED PLACES IN THE EARLY SOURCES AND IN THE LETTERS OF GREGORY THE GREAT *

SECTION II. DEDICATIONS IN THE LETTERS OF GREGORY THE GREAT

1. THE RITE OF DEDICATION

We turn now to a consideration of the letters written by Gregory the Great in connection with the dedication of churches, oratories and monasteries to ascertain whether he merely accepted existing laws and regulations or whether he introduced any new elements. We may consider first the question of rite. As was mentioned above, Duchesne is of the opinion that from Gregory's letters one must conclude that there was no specific rite of dedication other than the celebration of Mass which he, mistakenly as we believe, thought was the only rite mentioned by Pope Vigilius in 538.[127] Even if one would grant that Duchesne's interpretation of Pope Vigilius' letter is correct, the writer is of the opinion that Gregory's manner of speaking implies the existence of a dedicatory rite distinct from the mere celebration of Mass, at least when the dedication included the placing of relics. From his letters alone one cannot determine what ceremonies were employed; yet his words do not seem to refer only to the celebration of a dedicatory Mass. To cite a few examples: " His

* Section I of this article appeared in the April 1945 number of THE JURIST, pp. 181-215.

[127] Cf. *Origines*, p. 425, and *supra*, pp. 193, 194.

igitur procuratis [legitimate donation] benedictio optata proveniat. Nec antea dedicationis munus impertias. . . .Sanctuaria vero suscepta sui cum reverentia collocabis:" [128] ". . . praedictum oratorium solemniter consecrabis. . . .sanctuaria vero suscepta sui cum reverentia collocabis;" [129] ". . .venerandae sollemnia dedicationis impendens, praedictum ecclesiam et baptisterium sollemniter consecrare te volumus; sanctuaria vero suscepta sui cum reverentia collocabis;" [130] " tam ecclesiae quam etiam altaris noviter constructi dedicationem sollemniter exhibere;" [131] " eas esse inconsulte ac temere consecratas;" [132] " oratorium construxerit eumque sine praecepti auctoritate contra morem praesumpserit dedicare missasque illic publicas celebrare non metuit." [133]

Considering the above examples, it seems best, while admitting that absolute certainty is lacking, to assume that Gregory does refer to a dedication rite over and above the celebration of Mass. If our conclusioin regarding *Ordo Romanus* XLII [134] is correct, there is no reason for not holding that Gregory's letters refer to the rite there outlined.

[128] *Ep.* ii, 9.

[129] *Ep.* ix, 71.

[130] *Ep.* vi, 22. Baptistries already existed in the cemeteries during the period of the persecutions. After the persecutions, baptistries were at first distinct buildings near the basilicas; later they became a part of the church itself. They were solemnly consecrated and often relics of saints were placed in them. Cf. Cascioli, " De Baptismatis Fontibus seu Baptisteriis," *Ephemerides Liturgicae*, XVII (1903), 211-220; Duchesne, *Origines*, pp. 320-329; Schuster, *Sacramentary*, I, 21; Eisenhofer, *Handbuch*, II, 234f. Cf. also *Liber Diurnus*, Formulas XXIX, Petitio De Dedicando Baptisteriis; XXX, Responsum Dedicandi Baptisterium—ed. Sickel, pp. 20-21; ed. Rozière, pp. 56-58.

[131] *Ep.* vi, 43.

[132] *Ep.* ix, 38.

[133] *Ep.* xiii, 19. Gregory's words here imply a distinction between consecration and the celebration of Mass. Yet even here the argument is not conclusive, since he says " missas *publicas*," and he may be stressing the " publicity " and not the Mass, since oratories were to be consecrated *absque missis publicis* (*Ep.* ix, 165), which phrase does not preclude dedication *cum missis privatis*.

[134] Cf. *supra*, p. 205.

For further study one may divide the pertinent letters of Gregory as follows accordingly as they deal with the dedication of:

1) a basilica or church—*Epp.* ii, 9; iii, 19; iv, 19; vi, 22. 43. 48; viii, 25; ix, 38. 45. 49. 165. 183; xi, 37. 56; xiv, 9;

2) an oratory—*Epp.* ii, 15; ix, 58. 59. 71. 180. 181; xi, 19; xiii, 19;

3) an oratory in a monastery for men—*Epp.* i, 54; v, 50; vi, 42;

4) an oratory in a monastery for women—*Epp.* iv, 8. 10; v, 2; iii, 58; viii, 5; ix, 137;

5) a monastery for men—*Epp.* i, 52; vi, 44;

6) a monastery for women—*Epp.* ix, 233; xiii, 18.

2. FORMULAS OF THE LIBER DIURNUS

Before treating the letters as they are grouped above, it seems best to consider some of them from another point of view, namely, according to the form of the letter itself, regardless of whether it deals with the dedication of a church, oratory or monastery. Nine of Gregory's letters are apparently written according to one formula,[135] which is very similar to Formula XI of the *Liber Diurnus,* entitled, "Responsum Oratori Dedicandi."[136] The question arises: were Gregory's letters written according to the Formula of the *Liber Diurnus,* or was the Formula of the *Liber Diurnus* formed from Gregory's letters? The entire question of the formation and date of the *Liber Diurnus* is differently answered by authors. Rozière, after stating that the exact time of the composition of the *Liber Diurnus* cannot be definitely set, and after giving his reasons, concludes that only the two dates at the extremities of the period of composition can be set with certitude: i. e. the final redaction of the *Liber Diurnus* took place between 685 and 751. He then goes on to say:

[135] *Epp.* ii, 9. 15; viii, 5; ix, 58. 71. 165. 180. 233; xiii, 18.

[136] Sickel, *Liber Diurnus,* p. 10; ed. Rozière, p. 37.

> Les premières rédactions du Liber Diurnus furent sans doute contemporaines de ces deux pontifes [Gelasius and Gregory], ou du moins l'auteur fit usage de documents qui remontaient à leurs pontificats.... L'analogie dure encore au onzième siècle, au moins partiellement. Toutefois les rôles sont changés: ce ne sont plus les écrits des pontifes qui servent de modèles aux formules, comme au temps de S. Grégoire; ce sont les formules qui fournissent des types aux rédacteurs des lettres pontificales.[137]

Sickel is of the opinion that the oldest manuscript now in existence of the *Liber Diurnus* was written about the year 800.[138]

[137] *Op. cit.*, pp. xv-xxv; xxviii. On page ccxv, Rozière gives the opinion of Garnier, who would date the *Liber Diurnus* from 567 to 752.

[138] After stating that he does not agree with Cardinal Pitra's theory [*Analecta novissima spicilegii Solesmensis altera continuatio* (Typis Tusculanis, 1885), I, 103ff.] that a large part of the formulas were taken from Gregory's *Register*, Sickel continues: "Cum adhuc negatum non sit registra Gregorii I. ad collectionem formularum componendam adhibita esse, de eis multum disserere supersedeo. Nonnullae formulae in epistolis etiam Gregorii praedecessorum agnoscuntur. Iam saepius commemoratum est formulam XI. ad epistulas Gelasii I. papae Jaffé K. 630, 680 et Pelagii I. JK. 958, 959 proxime accedere. Ut vero demonstretur formulas re vera ex curiali cancellaria originem duxisse, sufficit ad Gregorium reverti, idque eo magis quod huius quidem pontificis excerpta registrorum et nongentae fere epistulae nobis nota sunt. Ceterum veri est simillimum etiam formulas XI nec non XII ex Gregorii registris desumptas esse, JE. 1707, 1708 [i. e. *Epp.* ix, 180, 181]. Nam his duabus formulis petitio dedicationis oratorii praecedit, qua duo expetuntur. Quae optata ut explerentur, pontifici duobus epistulis opus erat, una ad eum episcopum data in cuius dioecesi oratorium recens constructum erat (f. XI), altera ad eum episcopum ex cuius dioecesi reliquiae expetebantur. Cum vero mandatis Gregorii ad episcopum Tyndaritanum et ad episcopum Neapolitanum (JE. 1707-1708) quae in registri excerptis continuatae sunt et certe in registro originali iuxta positae erant, ad petitionem Januariae religiosae eodem modo quo in form. XI et XII respondeatur, has duas de quibus agitur formulas ex Gregorii M. registro manasse licet suspicari. At non omnium sed paucarum tantum formularum collectionis primae, de qua sola hic sermo est, origo ad epistolas Gregorii eiusque praedecessorum referri potest . . . Rozieri igitur sententiam restringens, pro certo sumo hoc tantum, formulas I-LXIII iam saeculo septimo et octavo, et F. LXIV ad LXXXI iam saeculo octavo usurpatas esse et has duas partes praeterquam quod retractatae aut aliis formulis suppletae sunt, usque ad saeculum undecimum in usu mansisse."—Sickel, *Liber Diurnus*, pp. xi, xxxix, xl-xlii.

The two letters of Gelasius I to which Sickel refers in the course of his argument, JK 630 and JK 680,[139] could hardly have been the source for Formula XI since they lack some of what appear to be the essential phrases of that Formula. JK 958, a letter of Pelagius I, though similar in general outline to Formula XI, also lacks some of the characteristic phrases of that Formula; it could, therefore, hardly have been the source of Formula XI. JK 959, a second letter of Pelagius I, is practically identical with Formula XI, except that it lacks the last phrase: "Sanctuaria vero suscepta sui cum reverentia collocabis;" it undoubtedly reproduces a form letter as is evidenced by the following expression: "id est possessione ill. et ill., prestantes liberos a fiscalibus titulis solidos tot." If it did not reproduce a form letter, the exact possessions would be named. Whence then, was JK 959 derived? The most likely answer is that JK 959 was written according to Formula XI of the *Liber Diurnus,* which must have been in existence, therefore, before the time of Pelagius I, i. e., before 556 to 561.

Sickel's opinion that Formulas XI and XII came from Gregory's *Epp.* ix, 180, 181 (JE, 1707, 1708) is untenable for this but also for another reason. Formula XI at least must have been in existence (prescinding now from the argument advanced above) before July of the year 599, the date when these two letters were written, for three of Gregory's letters that are written according to this formula are incomplete and end with the phrase: "et cetera secundum morem." These three letters are *Epp.* viii, 5; ix, 233; xiii, 18. The latter two might possibly (though this seems improbable) refer to *Ep.* ix, 180,

[139] JK 679, which is very similar to JK 680, is quoted *supra,* p. 208. JK 630 runs as follows: "Gelasius Iusto episcopo Larinati. Priscillianus et Felicissimus viri devoti petitorii nobis insinuatione suggesserunt, in re proprii que Mariana vocatur basilicam se pro sua devotione fundasse, quam in honore sancti archangeli Micahelis [sic!] et nomine desiderant consecrari. Et ideo, frater karissime, suscepta primitus donatione, que petitorio continetur, si ad tuam pertinet parroechiam benedictionem supra memorate basilicae solenni veneratione depende. Nichil sibi tamen fundatores ex hac basilica preter processionis aditum noverint vindicandum."—Loewenfeld, *Epistolae Ineditae,* N. 2, p. 1.

as they were written in August of 599 and in November of 602. The first letter that is incomplete, *Ep.* viii, 5, was written in October of 597; the "et cetera" could not, therefore, refer to *Ep.* ix, 180 (of July 599), but must have referred to an already existing formula, Formula XI of the *Liber Diurnus*.[140]

140 Cf. Götz, "Das Alter der Kirchweihformeln X-XXXI des Liber Diurnus," *Deutsche Zeitschrift für Kirchenrecht,* V (1895), 4ff. Bresslau cites this work, stating that Götz sought to show that Formulas X-XXXI were the oldest portion of the *Liber Diurnus;* cf. *Handbuch der Urkundenlehre für Deutschland und Italien* (2 vols., vol. 2, 2. ed. by Hans-Walter Klewitz, Berlin-Leipzig: Verlag Walter De Gruyter and Co., 1931), II, 243, note 2. After giving Sickel's dates for the formation of the *Liber Diurnus,* Bresslau states: "Im übrigen enthält aber schon die Sammlung der ersten 63 Formulare manche Stücke, die wahrscheinlich einem noch älteren Formularbuche entlehnt sind, und hierzu dürften namentlich diejenigen gehören, die völlig oder grösstenteils mit Urkunden Gregors I. übereinstimmen: denn dass in der päpstlichen Kanzlei Formulare benutzt worden sind, ist für die Zeit Gregors I bestimmt zu erweisen, aber auch schon für eine frühere Zeit durchaus wahrscheinlich."—*ibid.,* p. 243. Peitz, whose theory has been subjected to much criticism, assigned the major portion of the *Liber Diurnus* to pre-Gregorian times; cf. "Liber Diurnus—Beiträge zur Kenntniss der ältesten päpstlichen Kanzlei vor Gregor dem Grossen," *Sitzungsberichte-Akademie der Wissenschaften in Wien, Philosophisch-historische Klasse* CLXXXV (1918), 1-144. Tangl is in agreement with Sickel that part of the formulas of the *Liber Diurnus* come from the *Register* of Gregory the Great, but believes that a few formulas existed before his time; cf. "Gregor-Register und Liber Diurnus," *Neues Archiv,* XLI (1919), 751; cf. also Michels, "Beiträge zur Geschichte des Bischofsweihetages im christlichen Altertum und im Mittelalter," *Liturgiegeschichtliche Forschungen,* X (1927), 41f. Boüard in general follows Sickel; cf. *Manuel de diplomatique française et pontificale* (Paris: Éditions Auguste Picard, 1929), pp. 138-142. The question of the formation and early use of the *Liber Diurnus* was again opened for discussion by the appearance of another work by Peitz: *Das vorephesinische Symbol der Papstkanzlei* (Miscellanea Historiae Pontificiae, I, Romae: Typis Pontificiae Universitatis Gregorianae, 1939). Mohlberg and Altaner continued the discussion; their articles, under the same title, "Neue Erörterungen zum 'Liber Diurnus'" appeared in *Theologische Revue* XXXVIII (1939), 297-303, and 304-306, and have been taken into account in the conclusions reached by Santifaller: "Der sog. *Liber Diurnus* ist eine kanonistische Sammlung, die neben zahlreichen anderen Texten auch einige Formulare von Papsturkunden enthält; die Entstehung dieser Sammlung reicht in das 6. Jahrhundert zurück, und ihre uns heute überlieferten, dem 9. Jahrhundert angehörenden Handschriften sind sehr wahrscheinlich im östlichen Oberitalien entstanden; der heutige Titel LD hat sich allem Anscheine nach erst sehr spät, vermutlich in der 2. Hälfte des 11. Jahrhunderts gebildet. Entgegen der bisherigen Lehre war der LD. keinesfalls seit dem 9. Jahr-

If we check the letters of Gregory written according to this one form, we find that two of them deal with the dedication of a church,[141] two of them with the consecration of a monastery,[142] and five of them with the consecration of an oratory.[143] It is not known why this one Formula was used for the dedication of churches and monasteries as well as for oratories, since the title is: "Responsum Oratorii Dedicandi." Perhaps the title was only added later; perhaps Gregory felt that this Formula alone expressed the conditions he wished emphasized for the two churches and the two monasteries for which it was used.

In this group of letters written according to one form, all are written to bishops subject to the Pope as Metropolitan of Rome,[144] and all begin with the name of some person who has built a church or an oratory or a monastery out of his own means and requests that it be consecrated. It has been seen that Pope Gelasius had forbidden the bishops of the Italian provinces to dedicate a church without the Pope's consent; each of these letters of Gregory grants such permission, if the following conditions are fulfilled: 1) if the building is in the bishop's diocese;[145] 2) if no body is buried there;[146] 3) if the

hundert und sehr wahrscheinlich niemals das wirklich verwendete Formularbuch der päpstlichen Kanzlei und dementsprechend ebensowenig ein Schulbuch für die Heranbildung des Kanzleinachwuchses und hat als Ganzes mit der päpstlichen Kanzlei nichts zu tun gehabt."—"Zur Liber Diurnus-Forschung," *Historische Zeitschrift,* CLXI (1939-40), 538. The latter opinion is quoted for what it is worth.

141 *Epp.* ii, 9; ix, 165.

142 *Epp.* ix, 233; xiii, 18.

143 *Epp.* ii, 15; viii, 5; ix, 58. 71. 180.

144 Cf. *infra.* p. 350f.; all of Gregory's letters are there listed according to the place to which they were written.

145 This regulation is missing in *Ep.* viii, 5, and would have been meaningless since the bishop himself had founded the monastery in his own city; *Ep.* ix, 165 doesn't say "if" but positively states that the church is in the bishop's city. This regulation is in agreement with previous enactments; cf. *supra,* p. 206ff.

146 Cf. *supra,* p. 207, note 102, for an explanation of this condition. Justinian's Code (I, 2, 2) forbade the burying of bodies in churches consecrated to aposties or martyrs.

donation is made according to law and provides a sufficient endowment. All of the letters, moreover, provide that relics are to be placed reverently in the place that is to be dedicated.

In one of these letters,[147] however, Gregory mentions a special condition that is not found in any of his other letters dealing with dedication, namely, that the founder of the church is to have no special rights over and above those common to all Christians—" enuntiaturus ex more nihil illic conditoris iuri ulterius deberi, nisi processionis gratia, quae Christianis omnibus in commune debetur." Just why this phrase is lacking in Gregory's other letters is not known. Since he says " ex more ", and since an identical prescription is found in two of Pope Gelasius' letters and in two fragments,[148] it may be conjectured that Gregory took such a regulation for granted whenever a layman founded a church, an oratory or a monastery. For the Gelasian formula was decreed against lay interference which began to be felt at that time in many places of the East and the West.[149] Gregory may have added the provision against any special rights for the founder in *Ep.* ii, 9, who was a deacon of the church of Messina in Sicily, because of the unsettled conditions there at that time.[150] Or perhaps it was added simply because the founder was a deacon. But then one should expect to find it in *Epp.* viii, 5 and xiii, 18; the first is written to Bishop Venantius of Luna and gives him permission to consecrate a monastery which he had founded for nuns in his own house; the second grants Bishop Passivus of Fermo permission to consecrate a monastery founded by the deacon Procolus. However, the rights of mon-

[147] *Ep.* ii, 9.

[148] *Epp.* 34, 35—Thiel, *Epistolae,* pp. 448, 449; JK, 679, 680; Nos. 2, 15—Loewenfeld, *Epistolae Ineditae,* pp. 1, 8; JK, 630, 704.

[149] In both of Pope Gelasius' letters and in the two fragments, the founders are laymen; it is against these that the provision is inserted. Cf. *supra,* pp. 207-209.

[150] Cf. *Epp.* i, 39a. 42, both to Peter the Subdeacon who was appointed Vicar in Sicily (*Ep.* i, 1).

asteries were quite well defined at this time; besides, the abbot or the superioress could always complain to the Pope against any usurpations on the part of the founder. Hence a particular phrase prohibiting such usurpations in the two letters in question hardly seems necessary, and one may conclude that the founder's being a deacon, plus some special conditions present in the case, prompted Gregory to make the addition in *Ep.* ii, 9.

The phrase "nisi processionis gratia" (Pope Gelasius used "praeter processionis aditum;" "nisi processionis aditum;" "nisi facultatem processionis") seems to indicate merely that the founder had the right, as did all Christians, of going in solemn procession to the church to assist at Mass.[151] Apparently the phrase is linked up with the stational liturgy, which had its beginning in the third century. Originally the *statio* signified a church that had been designated beforehand as the place for the celebration of Mass on a specified Sunday or feastday. In the fifth century a solemn procession was added, i. e., the clergy and people moved in procession to the stational church from a designated meeting-place, later called the *collecta,* which term certainly was in use before the year 600.[152]

The phrase used by Popes Gelasius and Gregory may have indicated that the founder not only had the right to take part in the procession but also to take precedence. The writer knows of no rules of precedence for the laity at that time, though the clergy certainly proceeded in a definite order. Besides, two of Pope Gelasius' letters, *Epp.* 34 and 35, say "prae-

[151] Thiel, in commenting upon the phrase used by Gelasius in *Ep.* 14, says: "Hoc est, ut infra ex epistolis 25, 33 et 34 necnon ex fragmento 21 manifestum fiet: *quo procedant atque confluant populi sacra illic peracturi.*"—*Epistolae,* p. 375, n. 104. "*Processionis gratia,* id est, missarum celebratione."—*Liber Diurnus,* Rozière, p. 37.

[152] Cf. Kirsch, "L'origine des stations liturgiques du Missel Romain," *Ephemerides Liturgicae,* XLI (1927), 137-150; Kirsch, *Die Stationskirchen des Missale Romanum,* pp. 1-14; Grisar, *Das Missale im Lichte römischer Stadtgeschichte,* pp. 4-16; Morin, "La part des papes du sixiéme siècle dans le développement de l'année liturgique." *Revue bénédictine,* LII (1940), 1-14.

ter processionis aditum *qui omni christiano debetur.*"[153] Moreover, Gregory in this very letter permits only ". . . .processionis gratia, quae Christianis omnibus in commune debetur." The last clause seems to preclude any right of precedence.

Formula XXX of the *Liber Diurnus,* entitled "Responsum Dedicandi Baptisterium," grants permission to dedicate a baptistry which has been built in a basilica that originally had none. The permission contains this phrase: "Denunciaturus ex more nihil illic iuris fundatoris ulterius iam deberi, nisi processionis gratiam, quae christianis omnibus in commune debetur."[154] Though Garnier and Baluzius note[155] that some baptistries contained altars, the above phrase seems to point to the right of procession to the basilica for the celebration of Mass and not to the right of procession to the baptistry itself. This conclusion is strengthened by the fact that Formula XXXI, which grants permission to dedicate a baptistry built apart from a church, lacks the phrase.[156]

Only in two of Gregory's dedication letters[157] does one find that the founder has, during his or her lifetime, the usufruct of part of what has been donated for the founding and upkeep of the church or oratory. This right seems to be a special concession granted only in the two cases mentioned. Perhaps it had been requested for some special reason, though one cannot definitely say, since none of the letters of petition have been preserved in the *Register* of Gregory's letters.[158]

[153] Cf. *supra,* p. 208; Thiel, *Epistolae,* pp. 448-449; JK, 679, 680. The italics are not in the original.

[154] Sickel, p. 22; Rozière, p. 58.

[155] *Liber Diurnus,* Rozière, p. 56.

[156] *Liber Diurnus,* Sickel, p. 23; Rozière, p. 58.

[157] *Epp.* ii, 9, 15—both are written according to Formula XI of the *Liber Diurnus.*

[158] Formula X of the *Liber Diurnus* is a letter of petition; cf. ed. Sickel, p. 9; ed. Rozière, p. 36. Noteworthy therein are the following words: ". . . Quapropter quaeso apostolatum vestrum uti datis praeceptionibus vestris ad

Besides the nine letters written according to Formula XI, out of thirty-six letters treating of dedication, twenty are definitely original, i. e., they are in agreement with none of the Formulas of the *Liber Diurnus;*[159] four are written according to Formula XII, "Responsum de Speranda Sanctuaria;"[160] two are written according to Formula XV, "Responsum De Dedicando Oratorio Intra Monasterium;"[161] and one according to Formula XIX, "Responsum."[162] It has been seen that Formula XI must have been in existence before the time of Gregory the Great. There is no proof, however, that the other three forms, Formulas XII, XV, and XIX, were also in existence before his time: no letters similar to them are listed by Jaffé-Kaltenbrunner as having been written by any of Gregory's predecessors; none of Gregory's letters written according to these three Formulas are abbreviated, and none ends with the phrase "et cetera secundum morem."[163] Gregory's letters, therefore, were apparently the sources for these three Formulas, XII, XV, and XIX. Formula XVI is identical with Formula XV, except that it adds at the end the sentence "Sanctuaria vero suscepta sui cum reverentia collocabis." Gregory's letters may have served as a model for this Formula also.

illum venerandum civitatis illius antistitem, quamvis supramemoratam basilicam debeat sacrosanctis misteriis consecrare, ut hoc facto beatitudinis vestrae temporibus sancta veneratio sumat augmentum. Promitto pariter nihil mihi de eodem loco ulterius vindicandum, nisi processionis gratia, qua Christianis omnibus in commune debetur . . ." A similar petition is found attached to a letter of Pope Symmachus of 514; cf. Thiel, *Epistolae,* p. 729.

[159] *Epp.* i, 52. 54; iii, 19; iv, 8. 10. 19; v. 2; vi, 22. 42. 43. 44. 48; viii, 25; ix, 38. 49. 137. 183; xi, 37. 56; xiii, 19.

[160] *Epp.* ix, 45. 59. 181; xi, 19; cf. *infra,* p. 342.

[161] *Epp.* iii, 58; v. 50; cf. *infra,* p. 344.

[162] *Ep.* xiv, 9; cf. *infra,* p. 340.

[163] The phrases "et cetera" and "et cetera secundum morem" are found in nine of Gregory's letters: three of them (*Epp.* viii, 5; ix, 233; xiii, 18) refer to Formula XI; the remaining six (*Epp.* ii, 39. 40; v, 20. 21. 22; ix, 210) refer to the election of a bishop and to the appointment of a bishop visitor.

3. DEDICATION OF CHURCHES OR BASILICAS

Of the letters that treat of the consecration of a basilica or church,[164] *Ep.* ii, 9 has been sufficiently considered already. In *Ep.* iii, 19 the Pope asked Peter, rector of the Church's patrimony in Campania at that time,[165] to send him some relics of St. Severin as he wished to consecrate a church in Rome formerly held by Arians. The next letter, *Ep.* iv, 19 treats of the church of St. Agatha in the Subura district of Rome, which was restored to the Catholics after it had been held by the Arians. The church is placed in charge of a certain Acolyte named Leo, whom the Pope charged with the duty of collecting the revenues and expending them for the proper upkeep and repair of the church. In the letter itself there is no mention of any dedication, but in the *Dialogues* St. Gregory says that it was dedicated in honor of Saints Sebastian and Agatha: ". . .placuit ut in fide Catholica introductis illic beati Sebastiani et sanctae Agathae martyrum reliquiis dedicari debuisset: quod factum est. Nam cum magna populi multitudine venientes, atque omnipotenti Domino laudes canentes, eamdem ecclesiam ingressi sumus. Cumque in ea iam Missarum solemnia celebrarentur. . . ." [166]

[164] *Epp.* ii, 9; iii, 19; iv, 19; vi, 22. 43. 48; viii, 25; ix, 38. 45. 49. 165. 183; xi, 37. 56; xiv, 9.

[165] Cf. *Ep.* iii, 1.

[166] *Lib.* iii, c. 30. The account continues with the story of the miraculous happenings in the church both on the day of dedication and afterwards. Had St. Gregory not been so intent upon proceeding with these accounts, he might have given more details concerning the rite of dedication. The succinct statement given above seems to indicate that there was a rite of dedication first, and then the celebration of Mass. The fact of the dedication of the church of St. Agatha is also mentioned in St. Gregory's life in the *Liber Pontificalis,* I, 372: "Eodem tempore dedicavit ecclesiam Gothorum quae fuit in Subora, in nomine beatae Agathae." Pope Symmachus had built a church in honor of St. Agatha on the Via Aurelia, outside the city. The church of the Goths in the Subura district, however, was built by Flavius Ricimer, Consul of the year 459, and there is no indication that it had been dedicated to St. Agatha before it was so dedicated in 592 by Gregory the Great, who is responsible for placing her name in the Canon of the Mass. Cf. Kennedy, *Saints*

These two churches were dedicated after they were recovered from the Arians. Whether they had been previously dedicated and then lost their consecration through their use by heretics cannot be proven by any document, though Ewald states: "Ecclesias autem ex haereticis in orthodoxos conversas *denuo* [italics not in original] consecrandas esse, ut Maurini adnotant, Gregorius ipse in *Dial.* L. iii, c. 30 docet." [167]

Another instance of the dedication of a church that had been restored is found in *Ep.* vi, 43, but here the original basilica of St. Stephen in Rimini was destroyed by fire. Gregory grants permission to Bishop Leontius to dedicate solemnly both the church and the altar, and states that he wishes the bishop to place therein relics of St. Stephen. From Gregory's words alone one cannot determine whether the basilica had been consecrated before or not, though a negative answer would seem called for, since he makes no mention of a *re*consecration or

of The Canon, pp. 170-173; Hosp, *Die Heiligen im Canon Missae* (Graz: Verlagsbuchhandlung "Styria," 1926), p. 213. Verbeke has sought to prove that the Mass for the feast of St. Agatha, February 5, and especially the Introit *Gaudeamus,* was the personal work of Gregory the Great. The author's conclusion is well substantiated; cf. "S. Grégoire et la messe de S. Agathe," *Ephemerides Liturgicae,* LII (1938), 67-76.

[167] Note 2 ad *Ep.* iii, 19. The Maurists state: "'Porro ecclesias catholicorum ab Arianis aut aliis haereticis occupatas et catholicis postmodum redditas, novo semper fuisse ritus dedicatas vix ausim affirmare.'—*Gussanv.* [i.e., Goussainville, editor of the 1675 edition of Gregory's letters] Quidquid sit de saeculis quae praecesserunt, certo Gregorius rituum ecclesiasticarum peritissimus, basilicas ab haereticis pollutas denuo consecravit. Vide l. iii, *Dial.* c. 30."—Notes ad Lib. iii, *Ep.* xix of the Maurist edition. They do not say, as Ewald claims, that Gregory teaches in the *Dialogues* that churches are to be *re*consecrated; they merely point to the fact of which Gregory speaks in *loco citato.* There is nothing in the passage of the *Dialogues* about *re*dedication. Nor is there any mention of *re*consecration in the life of Pope John I (523-526), of whom the *Liber Pontificalis* says: "summo fervore Christianitatis hoc consilio usus est, ut ecclesias Arrianorum catholicas consecraret."—ed. Duchesne, I, 275. Formula XXIV of the *Liber Diurnus* grants permission to dedicate churches recovered from the Arians. It is not very similar to either of Gregory's letters mentioned above, and has these words at the end: "praedictam basilicam reconciliandi atque consecrandi tibi nostris praeceptionibus facultatem attributam noveris adtributam." Sickel, p. 18.

of a *re*placing of relics. It is known, however, that Galla Placidia had built a church in honor of St. Stephen in Rimini —unless a portion of his relics had been placed therein at the time it was built, it would hardly have been named in his honor.[168]

Ep. vi, 22, written to Bishop Peter of Aleria in Corsica and informing him that the Pope has had built on church property in Corsica a basilica and a baptistry in honor of Saints Peter and Lawrence, bids him to consecrate both places solemnly and reverently to place the relics. There is here no mention of any endowment or legitimate donation, since the basilica would be supported from the revenues of the church's patrimony.

From *Ep.* vi, 48, written to Bishop Palladius of Saintes in Aquitania, one may gather that the Bishops of Gaul did not ask the Pope's permission to dedicate their churches, and that the church in question had been dedicated without relics. For Gregory wrote that he has learned that the bishop had built a church in honor of the apostles Peter and Paul and of the martyrs Lawrence and Pancratius, and had placed therein thirteen altars, of which four were not *yet* dedicated since the bishop had determined to place therein relics of the abovementioned saints. "Et quia reliquias. . .cum veneratione praebuimus, hortamur, ut eas cum reverentia suscipere et collocare auxiliante Domino debeatis, provisuri ante omnia ut servientibus ibidem non debeant alimoniorum deesse suffragia." No permission to dedicate the four remaining altars with relics is contained in those words; Gregory merely fur-

[168] Cf. Hartmann's note 1 ad *Ep.* vi, 43. Formula XXVII of the *Liber Diurnus* is a formula granting permission to dedicate a basilica that had been restored after destruction by fire; cf. Sickel, p. 19. It is not very similar to Gregory's letter, vi, 43, and has a special ending: ". . . facultatem tribuimus, ut fidelium devotione competens sortiatur effectum. *si sanctuaria noviter missa:* sanctuaria vero suscepta sui cum reverentia collocabis." The italicized words are printed in special type by Sickel and appear to be a note indicating an optional ending which the scribe would use when occasion demanded. An identical observation is made by Garnier; cf. Rozière, *Liber Diurnus,* p. 54.

nishes the relics for the dedication and exhorts the bishop to provide a sufficient endowment for the church so that the ministers will be adequately provided for.[169]

The Jews of Palermo complained to the Pope that Bishop Victor of that city had wrongfully confiscated some of their synagogues. In reply, Gregory wrote to the bishop, ordering him to observe the law and to return whatever had been illegally taken; if necessary, the case was to be brought to Rome for settlement, and in the meantime the bishop was not to consecrate the confiscated places.[170] Five months later, in October 598, the Pope wrote to the *defensor* Fantinus, rector of the patrimony at Palermo, saying he had been informed by his notary

> eas [synogogas] esse inconsulte ac temere consecratas; idcirco experientiae tuae praecipimus, ut, quia quod semel consecratum est Judaeis non valet ultro restitui, quantum a filiis glorioso Venantio patricio et Urbico abbate, synagogae ipsae cum his hospitiis quae sub ipsis sunt vel earum parietibus cohaerent atque hortis ibi coniunctis aestimatae fuerint, studii tui sit, ut praefatus frater et coepiscopus noster dare pretium debeat, quatenus et quid occupari fecit, in iure ecclesiae ipsius valeat permanere et illi opprimi aut aliquam pati iniustitiam nullo modo videantur.

169 This last provision is in general agreement with canon 25 of the Council of Epâon of 517; cf. *supra,* p. 191. The word "altar" occurs in the following letters of Pope Gregory: *Epp.* i, 42; iii, 7. 56; iv, 20, 26. 37. 48; v, 53a. 57a; vi, 43; vii, 5; ix, 147. 214. 218; xi, 56. 56a., but only in two of these letters, *Epp.* iv, 48 and vi, 43, is there reference to the consecration of the altar. *Ep.* iv, 48 mentions thirteen altars in one church; vi, 43 mentions but one. Two letters also speak of building altars: *Ep.* iii, 56 speaks of an altar built in a monastery where a baptismal font had originally been (cf. *infra* p. 346, note 193; *Ep.* xi, 56, speaking of the conversion of heathen temples to Christian worship, says: "Aqua benedicta fiat . . . altaria construantur, reliquiae ponantur . . ." There is no indication in any of Gregory's letters as to the number of altars regularly built in churches; the remaining letters mentioned above refer to the ministry of the altar in general.

170 Cf. *Ep.* viii, 25.

He also bade Fantinus to restore all books and ornaments that had been unjustly taken.[171]

Relics were placed not only in churches and altars, but also in baptistries: " Paulus ecclesiae Reatinae diaconus petitoria nobis insinuatione poposcit, ut ad fontes in basilica beatae Mariae semper virginis genetricis Dei et domni nostri Iesu Christi. . .reliquiae beatorum martyrum Hermae et Hyacinthi et Maximi debeant collocari. . . ." [172] The letter closes with a request to Bishop Chrysantus of Spoleto to go to Rieti and reverently to place the relics. One condition only is mentioned: if no body is buried there, i. e., in the baptistry.

In *Ep.* ix, 183 Gregory sent Bishop Constantius of Milan relics of Saints Paul, John and Pancratius, adding the warning that the bishop should not fail " quatenus in locis quibus recondendae sunt luminaria vel alimonia ibidem servientibus ante dedicationem loci ipsius debeant profligari et tunc eisdem locis directa sanctuaria sui cum reverentia collocentur, ne loca Deo dicata, si praedicta provisio omissa fuerit, futuris temporibus destituta, quod absit, servientium repperiantur obsequiis." A similar provision is mentioned in *Ep.* vi. 55 to Queen Brunichild, to whom the Pope sent some relics of the apostles Peter and Paul at her request. He begged her to see to it that they were placed with all due reverence and that those serving the place where the relics are should be free from all cares.

The story of Augustine's mission to England is too well known to require repetition here. But the special provision made by Pope Gregory in regard to pagan temples must be considered. In June of 601, after King Ethelbert's conversion, the Pope wrote to him, among other things: ". . .zelum rectitudinis tuae in eorum conversione multiplica, idolorum

[171] *Ep.* ix, 38. Canon 24 of the Council of Chalcedon decreed that monasteries once consecrated could not become secular dwelling places; those who permitted this to happen were to be subjected to canonical penalties. Cf. Bruns, *Canones,* I, 31.

[172] *Ep.* ix, 49.

cultus insequere, *fanorum aedificia everte,* subditorum mores in magna vitae munditia exhortanda, terrendo, blandiendo, corrigendo et boni operis exempla monstrando aedifica."[173] After further consideration of the question of pagan temples, as he himself says in *Ep.* xi, 56 of July of 601, addressed to Abbot Mellitus in Gaul on his journey to England, Gregory decided that the temples should not be destroyed. To Mellitus he wrote that he was to inform Augustine to overthrow the idols, and to purify the temples by sprinkling them with holy water, to build altars and to place relics therein—on the day of dedication or on the feast day of the martyrs whose relics are placed in the temple, the people are to be allowed to have a religious celebration in praise of the true God. Gregory adds the reason for his change of mind, namely, that the people must be educated slowly towards a higher form of sacred worship. After stating that it is difficult to criticize Gregory's regulation in this matter, Dudden observes:

> Long after Gregory was dead, the idol-sacrifices, the worship at fountains, stones, and trees, the eating of consecrated flesh, the multitudinous forms of augury and divination, continued to be practised by the people. But whether the continuance of these abuses can be attributed to an initial mistake of a compromise with heathenism, and whether more drastic measures would really have succeeded in preventing their survival, we cannot at this time pretend to determine.[174]

The pagan temples were to be purified with holy water: "aqua benedicta fiat, in eisdem fanis aspergatur." This is the only mention in all of Gregory's letters of holy water and of its use to purify a temple That aspersions were frequently used, particularly in the Gallican rite in the time *after* Gregory the Great, is evident from the rite contained in *Ordo*

[173] *Ep.* xi, 37. Italics inserted by the writer.

[174] *Gregory the Great,* II, 127.

Romanus XLI, and in the blessing performed by St. Columbanus.[175]

The last letter dealing with the consecration of a basilica is very brief. It contains nothing new, but as it is identical with Formula XIX of the *Liber Diurnus* it may be quoted:

> Basilicam quam a dilectione tua in honorem beatae semper virginis Mariae per Savinum subdiaconum nostrum et rectorem patrimonii suggeris esse perfectam consecrandi tibi praeceptionis nostrae serie facultatem noveris attributum, quatenus, frater carissime, devotionis tuae desiderium complens celebritatis perfectione gratuleris.[176]

4. DEDICATION OF ORATORIES

The next group of letters treats of the dedication of an oratory.[177] Though four of these letters [178] have been treated insofar as they were written according to one formula and contained general regulations, they must be considered now to ascertain whether any special regulations existed for the dedication of an oratory. Three of these four letters conclude as follows: "praedictum oratorium absque missis publicis sollemniter consecrabis ita ut in eodem loco nec futuris temporibus baptisterium constituatur, nec presbyterum constituas cardinalem. Et si missas sibi fieri forte maluerit, a dilectione tua presbyterum noverit postulandum, quatenus nihil tale a quolibet alio sacerdote ullatenus praesumatur. Sanctuaria vero suscepta sui cum reverentia collocabis." [179]

[175] Cf. *supra*, pp. 206, 212, note 121. With the water for the lustrations in the dedication ceremony of today are mingled salt, ashes and wine—the result is known as "Gregorian Water." Schuster maintains this name is derived from Gregory's prescription in *Ep.* xi, 56. Cf. *Sacramentary*, I, 153.

[176] *Ep.* xiv, 9. Formula XIX of the *Liber Diurnus* is to be found on p. 15 of Sickel's edition, and on p. 47 of Rozière's. The latter gives Baluzius' note: "Eadem iisdemmet verbis extat apud S. Gregorium." It is probable that Formula XIX was taken from Gregory's letters; cf. *supra*, pp. 325-328.

[177] *Epp.* ii, 15; ix, 58. 59. 71. 180. 181; xi, 19; xiii, 19.

[178] *Epp.* ii, 15; ix, 58. 71. 180. Cf. *supra*, pp. 325-333.

[179] *Epp.* ii, 15; ix, 58. 180.

The fourth letter, *Ep.* ix, 71, omits the words " absque missis publicis" and concludes: "Presbyterum quoque te illic constituere volumus cardinalem, ut quoties praefatus conditor fieri sibi missas fortasse voluerit vel fidelium concursus exegerit, nihil sit quod ad sacra missarum sollemnia exhibenda valeat impedire; sanctuaria vero suscepta sui cum reverentia collocabis." The oratory in question (Gregory calls it that twice) was built by " Anio comes castri Aprutiensis " (Teramo) in the castle or village itself.[180] This is the only letter of Gregory which permits the institution of a cardinal priest in an oratory; for all the other oratories of which he writes, there are the prohibitions against the building of a baptistry, and the establishment of a cardinal priest; if the founder wishes to have Mass said, he is to ask the bishop for a priest. Similar prohibitions against the building of a baptistry and the establishment of a cardinal priest will be noted in the case of monastic oratories also.

Three of the letters of this group are requests sent to bishops bidding them grant relics requested for the dedication of a particular oratory.[181] These four letters are identical in form with the necessary changes of name and place:

[180] Referring to this letter Hinschius states: ". . . hier handelt es sich, wie die Worte " vel fidelium concursus exegerit " ergeben, nicht um ein einfaches Privatoratorium, sondern um ein Gotteshaus, das der Mittelpunkt des Gottesdienstes auch für andere Personen werden sollte, und es ist weiter charakteristisch, dass hier das sonst übliche Verbot, ein Baptisterium bei der Kapelle zu errichten, fehlt. Wenngleich von der Erbauung eines solchen in dem Briefe die Rede ist, so waren doch offenbar die lokalen Verhältnisse in dem in Rede stehenden Falle der Art, dass die Kirche schon jetzt als zukünftige Taufkirche in Aussicht genommen und deshalb schon der festangestellte Priester als cardinalis bezeichnet werden konnte. Demgemäss wiederlegt diese Stelle, wenn gleich ihr Sprachgebrauch ungewöhnlich sein mag, die hier vertretene Annahme, dass der Geistliche einer Tauf- oder Pfarrkirche ebenfalls presbyter cardinalis genannt wurde, nicht und das umsoweniger als mindestens für den Anfang des 9. Jahrhunderts sich die Identität von ecclesia baptismalis und cardinalis nachweisen lässt."—*Kirchenrecht,* I, 316f.

[181] *Ep.* ix, 59 provides for the oratory spoken of in ix, 58; ix, 181 for the oratory of ix, 180; xi, 19 for an oratory built by the ex-monk Venantius. With them may be joined *Ep.* ix, 45, as it is a request for relics for a basilica that is to be built and dedicated.

> Valerianus notarius ecclesiae Firmanae sanctuaria beati martyris Savini oblata petitione sibi postulat debere concedi, quatenus in eius nomine oratorium propriis constructum sumptibus possit sollemniter consecrari. Et ideo, frater carissime, praefati desideriis ex nostro te mandato [ex nostra te praeceptione in *Epp.* ix, 45. 181, and xi, 19] convenit oboedire ut devotionis suae in consecratione quam postulat potiatur effectum.[182]

The final letter of this group[183] is written to the subdeacon John, papal *apocrisiarius* at Ravenna. After exhorting him to settle some other questions, the Pope concludes his letter thus:

> Indicavit [i. e. a certain bishop whose see is unknown] etiam nobis, quod quidam Exuperantius episcopus [see also unknown] ausu temerario in dioecesi ipsius oratorium construxerit eumque sine praecepti auctoritate contra morem praesumpserit dedicare missasque illic publicas celebrare non metuit. Quam rem cum summa te celeritate ac districtione convenit emendare nec ulterius tale aliquid attemptari permittere. Oraculum vero quod incompetenti persona reppereris esse constructum huic proprio te volumus episcopo, si res, ut dictum est, ita se habere constiterit, sine mora aliqua reformare.

The III Council of Orleans of 538 had forbidden a bishop to consecrate a church in another's diocese without the latter's permission under pain of suspension from saying Mass.[184]

[182] *Ep.* ix, 59. Formula XII, "Responsum de Speranda Sanctuaria", of the *Liber Diurnus* is identical with these letters; cf. ed. Sickel, p. 11; Rozière, p. 41. The latter edition, p. 41, gives Garnier's note: "Tota haec formula, quemadmodum et consequentes duae, desumpta est ex epist. 26, lib. ix S. Gregorii (xi, 31) [which is *Ep.* xi, 19 in Ewald's and Hartmann's numeration]; habetur etiam lib. vii, ep. 107 (ix, 71) [which is *Ep.* ix, 59 in our enumeration]." On page 42 of Rozière's edition, Baluzius' note refers Formula XIV to *Ep.* xi, 64 of the Maurist edition, which is *Ep.* xi, 56a in Ewald's and Hartmann's edition. The section of the letter referred to, from which Baluzius thought Formula XIV was derived, has been marked as an interpolation by Hartmann. Cf. *infra*, note 216.

[183] *Ep.* xii, 19.

[184] Cf. *supra*, p. 213

There is no mention of suspension in the letter quoted, though the possibility that some canonical penalty was inflicted is not excluded, since Gregory never hesitated to punish even refractory bishops. As it is not known to which diocese either of the two bishops belonged, it is not known whether they were subject to the laws of the III Council of Orleans, or whether they were Italian bishops, subject to the rule laid down by Pope Gelasius (492-496) that they were not to dedicate churches or oratories without the permission of the Pope.[185]

5. DEDICATION OF MONASTIC ORATORIES

Another group of Gregory's letters treats of the dedication of monastic oratories.[186] *Ep.* i, 54, written to the subdeacon Peter, rector of the patrimony in Sicily, is the earliest known indication that an oratory was to be dedicated on a feast day:

> Festivitatibus sanctorum desiderabiliter insistentes praesentis praeceptionis paginam ad experientiam tuam necesse duximus dirigendam, indicantes ei, oratorium beatae Mariae, quod nuper in cella fratrum aedificatum est, ubi Marinianus abbas praeessee dinoscitur, Augusto mense disposuisse nos, adiuvante Domino, summopere dedicari, quatenus coepta nostra, operante Domino, debeant consummari. . . .

The remainder of the letter bids Peter to give money, wine and various items of food to the monastery for the day of the dedication, since the monastery itself was too poor to provide adequately for the occasion. In no other letter of Gregory is there any indication that dedications are to take place on a feast day. Ewald is of the opinion that the feast in question was the Assumption of the Blessed Virgin on the 15th of August, and that the monastery was situated at Palermo, being one of the six monasteries established by Gregory in Sicily before his election to the papacy.[187]

185 Cf. *supra*, p. 207.

186 *Epp.* i, 54; v, 50; vi, 42—refer to an oratory in a monastery for men; *Epp.* iii, 58; iv, 8. 10; v, 2; viii, 5; ix, 137—to an oratory in a monastery for women.

187 Cf. notes 1 and 2 ad *Ep.* i, 54.

It is possible to classify the remaining eight letters of this group dealing with monastic oratories according to the pertinent information they contain. Thus, three of them [188] deal specifically with the dedication itself, while the remaining letters mention the dedication only incidentally.[189]

Of the letters of the first classification, *Epp.* iii, 58 and v, 50 are very similar to Formula XV, "Responsum de Dedicando Oratorio intra Monasterium Monachorum," of the *Liber Diurnus.*[190] The two letters are identical, except that *Ep.* iii, 58 insists that the bishop inspect the will providing for the oratory; both are written to the bishop of Naples, granting him permission to dedicate solemnly the oratories, adding in each letter:

> ut quotiens necesse fuerit, a presbyteris ecclesiae tuae in sancto loco deservientibus celebrentur sacrificia veneranda missarum, ita ut in eodem monasterio neque fraternitas tua neque presbyteri praeter diligentiam disciplinae aliquid molestiarum inferant aut, si quid illic pro diversorum devotione commoditatis accesserit, sibi aestimet vindicari, cum ancillis Dei [monachis] in eodem loco deservientibus debeat proficere, quidquid offeri contigerit.

It is to be noted that it is the bishop in every case who has the right of dedicating an oratory, even in a monastery for men. There is no provision in these two letters that the oratories are to be dedicated "absque missis publicis," nor prohibitions against a baptistry or instituting a cardinal priest.

[188] *Ep.* v, 50—in a monastery for men; *Epp.* iii, 58; viii, 5—in a monastery for women.

[189] *Epp.* iv, 8. 10; v, 2; vi, 42; ix, 137.

[190] Sickel, *Liber Diurnus,* p. 12f., ed. Rozière, p. 44. Ewald, in his notes ad *Ep.* iii, 58 states: "Eandem formula praebet *Liber diurnus* n. XVI, nec multum ab ea discrepet n. XV." Formulas XV and XVI (the latter is entitled, "De Condendis Reliquiis intra Monasterium", Sickel, p. 13; Rozière, p. 45) are alike except that the latter adds at the end the words: "Sanctuaria vero suscepta sui cum reverentia collocabis." As *Ep.* iii, 58 omits all reference to relics, it cannot be the same as Formula XVI as Ewald states, but rather the same as Formula XV.

Since the two oratories in question were strictly monastic, such prohibitions were undoubtedly considered superfluous.

Nor is this latter statement weakened by the fact that one does find the three provisions just mentioned in *Ep.* viii, 5 which grants permission to Bishop Venantius of Luna to dedicate the oratory of a monastery which he had founded in his own house for nuns. This letter is not in harmony with Formula XV of the *Liber Diurnus,* as are the two preceding letters, but with Formula XI, "Responsum Oratorii Dedicandi," which has been considered already.[191] It is not known why Gregory, in three letters that dealt with the same subject matter, wrote two of them in one style, and the third in a different style. The style used by Gregory for the two letters later became known as Formula XV of the *Liber Diurnus,* and was thereafter regularly used whenever there was question of the dedication of an oratory within a monastery. That Formula omits all mention of the three provisions against public masses, a baptistry, and a cardinal priest. Such prohibitions, as stated above, were taken for granted whenever there was question of a monastic oratory, strictly speaking. When there may be some doubt as to the status of an oratory, Gregory specifically forbids public masses, a baptistry and a cardinal priest. That seems to be the most plausible explanation for *Ep.* ix, 165, which the writer listed above[192] as belonging to the letters dealing with the dedication of churches. For Gregory says in this letter, that a *church* has been built in Naples according to the last will of a certain Romanus, which the Pope asks Bishop Fortunatus to dedicate solemnly

> absque missis publicis cum veneratione debita ita ut in eodem loco numquam baptisterium construatur nec presbyterum constituas cardinalem. Sed quotiens missa ibi degentes illic *monachi* [italics not in original] fieri voluerint, a dilectione vestra noverint postulandum, quatenus nihil tale a quolibet alio sacerdote ullatenus praesumatur.

[191] Cf. *supra,* p. 325.

[192] Cf. *supra,* p. 325.

Is the word "church" merely a slip of the pen? It seems better to suppose that the founder wished to establish a *church* in which he wished to have monks celebrate the Divine Office. Gregory, however, thinking this arrangement not suitable if the church were to be open to the public for all services,[193] saw fit to lay down the above-mentioned prohibitions so that there would be no doubt as to the status of the place in the future.

The remaining letters of this group dealing with the dedication of a monastic oratory may be treated briefly since the dedication is mentioned only incidentally. Three of them deal with the same oratory.[194] The husband of Theodosia, a widow of Cagliari in Sardinia, had willed that a monastery be founded on a piece of land belonging to another. As there was some difficulty involved in carrying out this detail, the Pope granted Theodosia permission to found the monastery in her own house; at the same time he bade Bishop Januarius of Cagliari to see that the monastery be founded without further delay and to place the relics therein with customary reverence. A year later, in September 594, Gregory wrote of the same matter once more in *Ep.* v, 2, addressed to Bishop Felix and Abbot Cyriacus, who had been sent to Sardinia to convert pagans and to serve as agents of the Pope.[195] He bade them look into the complaints of Theodosia against Bishop Januarius for his avarice and ill will toward the monastery she had founded, which avarice and ill will he had

[193] Gregory was always careful to provide that monks and nuns were not to be disturbed by the faithful coming to their churches. *Ep.* iii, 56 is typical of this attitude; it was written to Bishop Secundinus of Taormina: "Pridem praecepimus, ut de monasterio sancti Andreas quod est super Mascalas baptisterium propter monachorum insolentias [De insolentiis vel molestiis monachis illatis agit papa.—Ewald in note 2] debuisset auferri, atque in eodem loco quo fontes sunt altare fundari . . . Sed repleto loco ipsarum fontium, altare ad sacra celebranda mysteria illic sine aliqua dilatione fundetur, quatenus et praedictis monachis opus Dei securius liceat celebrare, et non de neglegentia vestra contra fraternitatem tuam noster animus excitetur." Cf. also *Ep.* v, 49.

[194] *Epp.* iv, 8. 10; v, 2.

[195] Cf. Ewald's notes ad *Ep.* iv, 23.

manifested on the day of the dedication of the oratory. How the bishop had manifested his avarice is not mentioned. Perhaps he had demanded some remuneration for his services, or perhaps he had simply taken something as another bishop had once done.[196]

Concerning the last two letters[197] dealing with monastic oratories, a controversy had arisen as to whether they were really distinct or one and the same letter, entered twice into the *Register* by error. Hartmann has shown that they are two distinct letters, though he is not sure if the first one was ever sent to its addressee.[198] These two letters deal with property left by a certain priest of Rome for an oratory for monks—the will was already made in the time of Pope Pelagius II, and Gregory now wanted to carry it out. In the first letter, he told an Abbot (whose name is unknown) that the oratory has been dedicated and that the Abbot and his monks should dwell there since their own monastery was in ruins.[199] Why this plan was not carried out is not known. Three years later, 599, Gregory addressed the second letter to Abbess Bona, to whom he described the identical property, and to whom he now granted the oratory for her congregation of nuns, stating that it had been solemnly dedicated. Nothing further concerning the dedication is contained in these two letters.

6. DEDICATION OF MONASTERIES

A final group of letters deals with the dedication of the monastery itself, without any reference to any oratory therein.[200]

196 Cf. *Ep.* vi, 44.

197 *Epp.* vi, 42; ix, 137.

198 Cf. "Ueber zwei Gregorbriefe," *Neues Archiv,* XVII (1892), 193-198; notes ad *Ep.* vi, 42.

199 Hartmann believed that the reference may have been to the abbey of Monte Cassino, sacked by the Lombards about the year 581. Cf. preceding note, and McCann, *St. Benedict* (New York: Sheed and Ward, 1937), p. 123.

200 *Epp.* i, 52; vi, 44—monastery for men; *Epp.* ix, 233; xiii, 18—monastery for women.

The earliest letter of the group, *Ep.* i, 52, asks Bishop John of Sorrento to place solemnly the relics of St. Agatha, which the Abbot had had with him for some time, in the monastery of St. Stephen, if no body is buried there. There is no mention here of the dedication of the monastery; presumably it had been already dedicated to St. Stephen and the Abbot desired to add to the relics of St. Stephen those of St. Agatha, which he was fortunate enough to obtain at a later date. It is noteworthy that only the bishop could perform this solemn rite.

Ep. vi, 44 is unique among the dedication letters in that it contains a reference to a letter of Gregory's predecessor:

> Miramur fraternitatem vestram, ut serie praecepti neglecta, quam ad vos sanctae memoriae decessor noster dederat, monasterium a Johanne praesentium portitore constructum aliter, quam antiquae consuetudinis usus exigit, consecrares; dum etiam in eodem praecepto inter alia mandatum sit, ut locum ipsum absque missis publicis dedicares, et, ut ad nos pervenit, cathedra posita illic publice missarum sollemnia celebrantur. Quod si verum est, his vos hortamur affatibus, ut omni excusatione cessante cathedram vestram exinde amoveri modis omnibus faciatis nec denuo illic missas publicas peragatis. Sed sicut et consuetudo et praecepti tenor eloquitur, si missas ibidem sibi celebrari voluerint, a te presbyter dirigatur. . . .

The remainder of the letter states the Pope's wish that the monks who have been placed there are to remain, and that the bishop, if the report is true, is to restore a chalice he has taken.

Several interesting questions immediately arise: does Gregory refer to his immediate predecessor, Pelagius II? Does Gregory know the contents of the earlier *praeceptum* from a copy kept in the Roman archives? Does he know those contents from the original letter which John, bearer of the present letter and founder of the monastery, brought him? Or finally, does he know the contents from a general formula then in use for such occasions—were some of the formulas now given in the *Liber Diurnus* so well established that there

would be no doubt as to which one had been used for the earlier *praeceptum?*

From a study of the phrases used by Gregory when referring to his predecessors, it is reasonably certain that he refers here to his immediate predecessor, Pelagius II (579-590).[201] To the remaining questions no definite answer can be given. The letter of Pelagius II to which Gregory refers has not been preserved. That is no proof, of course, that no copy of it existed in the archives of Rome in Gregory's times. From his positive way of speaking of the contents of the *praeceptum* of his predecessor—for he says: "dum etiam in *eodem* praecepto"—it seems most probable to the writer that a copy did exist in the archives, or that John brought with his complaint the original letter. The phrases used by Gregory when speaking of the *praeceptum* (i. e., "absque missis publicis" and "si missas ibidem sibi celebrari voluerint") are like those that appear in Formula XI of the *Liber Diurnus.* As this Formula was in existence before Gregory's time, he may refer to that.

The two remaining letters which deal with the consecration of a monastery apart from the dedication of the oratory,[202] are written according to Formula XI of the *Liber Diurnus.* This Formula has already been considered, and it suffices to note that these two letters add nothing new.[203]

[201] "Decessor" in the following letters, even if no name is attached, refers definitely to Pelagius II: *Epp.* ii, 20. 21. 22 (cf. JK, 1060). 50; iii, 32; iv, 30. 36 (cf. JK, 1062); vi, 42; vii, 7 (cf. JK, 1061). 23. In the following letters it is not certain to whom "decessor" refers: *Epp.* i, 75; v, 39; xiii, 22. It is probable that those three letters refer to Pelagius II, since the name of the earlier Pope, exclusive of Pelagius II, is attached whenever Gregory refers to one of them, e. g., *Ep.* iii, 54—"decessoris nostri Johannis"; Ep. ix, 216—"praedecessore nostro Vigilio"; *Ep.* v, 56—"predecessor noster sanctissimus Leo." Jaffé-Kaltenbrunner came to the same conclusion, for JK, 1063 is a letter of Pelagius II to the Bishop of Pesaro, bidding him to dedicate a monastery "absque missis publicis." This letter, however, is preserved in no collection, and Jaffé-Kaltenbrunner refer to *Ep.* vi, 44, the letter in question here. Cf. also Kehr, *Regesta Pontificum Romanorum, Italia Pontificia* (8 vols. in 12, Berolini: Apud Weidmannos, 1906-1935), iv, 179.

[202] *Epp.* ix, 233; xiii, 18.

[203] Cf. *supra,* p. 325ff.

7. BISHOPS AND DEDICATION

To the following bishops Gregory granted permission to dedicate churches, oratories and monasteries in their dioceses:

1) Churches: Felix of Messina—ii, 9; Peter of Aleria—vi, 22; Leontius, Visitor (iii, 34) of Rimini—vi, 43; Victor of Palermo—viii, 25; ix, 38 (a prohibition rather than a permission); Chrysantus of Spoleto—ix, 49; Fortunatus of Naples —ix, 165; Constantius of Milan—ix, 163 (not a true permission); John of (see unknown)—xiv, 9.

2) Oratories: Castorius of Rimini—ii, 15; Passivus of Fermo—ix, 58. 71; Benenatus of Tindaro—ix, 180; Exuperantius of (see unknown)—xiii, 19 (a prohibition.)

3) Monasteries: John of Sorrento—i, 52; Felix of Pesaro—vi, 44; Decius of Lilybaeum—ix, 233; Passivus of Fermo—xiii, 18.

4) Monastic oratories: Fortunatus of Naples—iii, 58; v. 50; Januarius of Cagliari—iv, 8. 10 (not a true permission); Venantius of Luna—viii, 5.

All of the above-mentioned dioceses were in Italy (Rimini, Spoleto, Naples, Milan, Fermo, Sorrento, Pesaro, Luna), in Sicily (Messina, Palermo, Tindaro, Lilybaeum), in Corsica (Aleria) and in Sardinia (Cagliari). Hence all were subject to the Pope in his capacity of patriarch of the West. Two of the sees were metropolitan sees: Milan in northern Italy, and Cagliari in Sardinia.[204] It must be noted that in the letters to the bishops of these two cities, that is, in the letters dealing with dedication, the Pope does not expressly grant them permission to perform the rites of dedication as he does in the

[204] These two cities are listed as metropolitan by: Dudden, *Gregory the Great*, I, 357f.; Snow, *St. Gregory the Great*, (2. ed. New York: Benziger Brothers, 1924), 69f.; Duchesne, *Origines*, p. 30f.; Mann, *Lives of the Popes in the Early Middle Ages* (18 vols. in 19, St. Louis, B. Herder, 1902-1932), I, 56, 63; Grisar, *History of Rome and the Popes in the Middle Ages* (Authorized English translation edited by Luigi Cappadelta, 3 vols., London: Kegan Paul, Trench, Truebner and Company Ltd., 1911-1913), I, 344-348. For Cagliari, cf. *Ep.* i, 47.

cases of the other bishops. Thus in his letter to Bishop Constantius of Milan[205] Gregory says that, at the former's request, he is sending him relics of the apostle Paul and the martyrs John and Pancratius, and adds:

> Fraternitas ergo vestra solito studio perscrutare non differat, quatenus in locis quibus recondendae sunt luminaria vel alimonia ibidem servientium ante dedicationem loci ipsius debeant profligari, et tunc in eisdem locis directa sanctuaria sui cum reverentia collocentur....

Certainly these words differ from those used by Gregory, for example, to the Bishop of Rimini: "facultatem tribuimus dedicandi;"[206] or to the Bishop of Aleria: "debeat incunctanter accedere venerandae sollemnia dedicationis impendens."[207]

To the well-meaning but simple-minded Bishop Januarius of Cagliari, Gregory was forced to write many letters, some of them very sharp in tone.[208] But when he spoke to him regarding the dedication of a monastery founded by Theodosia, he did not use the normal phrase granting permission but expressed himself as follows: "Reliquiae vero. . .volumus ut a fraternitate tua sub debita veneratione condantur."[209]

Reference has been made[210] to the letters of Pope Gelasius demanding that no basilica or oratory was to be consecrated without the permission of the Apostolic See. Thiel argues that this law applied only to Italian bishops:

> Quippe in toto orbe nulli nisi ex auctoritate sedis apostolicae novas ecclesias consecrare tunc licuisse, quis assentiat? Hunc autem usum in Italiae provinciis obtinuisse, tunc ista Gelasii

[205] *Ep.* ix, 183.

[206] *Ep.* vi, 43.

[207] *Ep.* vi, 22.

[208] Cf. e. g., *Epp.* ix, 1; iv, 24. 26.

[209] *Ep.* iv, 8.

[210] *Supra*, pp. 207-209.

scripta tunc plures Gregorii I epistolae fidem faciunt. Forte et postea idem usus in aliis quibusdam provinciis receptus est.[211]

From the study of Gregory's letters it is evident that he felt it his right to grant permission to the bishops of Italy and of the adjacent islands to perform any dedication rites. If the bishop were a metropolitan, the papal permission was apparently not required—at least, Gregory does not explicitly grant such permission. That only the bishops of Italy and the adjacent islands had to obtain the Pope's permission may be seen from the letters dealing with dedication written by Gregory to the bishop of Saintes in Aquitania and for Augustine in England—in neither letter does Gregory grant any kind of permission as has been seen above.[212] During the fourteen years that Gregory was Pope there must have been some churches, oratories or monasteries built and dedicated in the territories subject to the eastern patriarchs. There is, however, no indication whatsoever in Gregory's *Register* that papal permission for dedicating such churches, oratories or monasteries was asked for or obtained. We have seen[213] that for a time the Emperor had the right to give permission before any place might be dedicated. How long that prerogative was exercised is not known; there is no indication in Gregory's letters that it was still in use in his day.

8. USE OF RELICS IN DEDICATION OF SACRED PLACES

In several of Gregory's letters, though they treat explicitly of the dedication of a given place, there is no mention of relics: *Epp.* i, 54 and iii, 58 speak of the dedication of a monastic oratory in honor of the Blessed Virgin; *Ep.* v, 50 speaks of the dedication of an oratory in honor of St. Peter

[211] *Epistolae*, p. 31. "Nicolaus I eam legem ad universalem usum transferre nisus est."—*ibid.*, p. 376. Cf. also note of Baluzius, *Liber Diurnus*, ed. Rozière, p. 53.

[212] *Epp.* vi, 48; xi, 56. Cf. *supra*, pp. 55 and 57f.

[213] *Supra*, p. 186.

and St. Michael, the archangel; *Ep.* xiv, 9, of a basilica in honor of the Blessed Virgin. As there existed no relics of the Blessed Virgin, there could be no mention of these. Yet, if the custom was universal that no place could be dedicated without relics[214] one would expect to find in these letters mention of relics of some other saint.

Relics of St. Peter certainly existed, as did also relics of Saint Michael, the archangel. Strange as it may seem, there exists in the *Liber Diurnus* a formula entitled: "De Danda Beneficia Sancti Angeli"—and Garnier, after showing that "beneficia" is a synonym for "relics", goes on to explain:

> Sed quaesierit aliquis quae tandem cogitari possint beneficia et reliquiae S. Michaelis? Nomine enim *archangeli* significari Michaelem certum est. Responderi potest fuisse fortasse ramentum ex lapide in quo olim archangelus apparuit, aut in Gargano monte, aut alibi uspiam. Credibilius tamen videtur fuisse pallium altari seu memoriae sancti archangeli impositum, et pro benedictione petentibus dono donatum. Hanc conjecturam auget, et vix non indubitatam reddit, quod mihi a v. c. Stephano Baluzio communicatum est, excerptum ex historia ms. monasterii S. Michaelis Cuxanensis in dioecesi Helnensi, quam Garsias ejusdem loci monachus composuit circa annum 1030; sic enim habet: *Sunt reliquiae ipsius gloriosi archangeli Michaelis, ex pallio scilicet ejus sanctae memoriae.*[215]

Yet in *Ep.* v, 50, there is neither reference to relics of St. Peter nor to such "beneficia" of St. Michael.[216] One must conclude, therefore, that in St. Greogry's time not all places were dedicated with relics. This conclusion is in agreement with the practice in Gaul at the time of Gregory of Tours, a contemporary of Gregory the Great.[217]

214 As the II Council of Nice *later* decreed; cf. *supra,* p. 192.

215 Rozière, *Liber Diurnus,* p. 42. Baluzius' note with the same explanation is given on page 43.

216 There is no reference in any of Gregory's letters to "beneficia" of the archangel; the one reference which some authors give to *Ep.* xi, 56a is incorrect, since Hartmann marks the passage in question as an interpolation.

217 Cf. *supra,* p. 191.

By far the greater majority of places were dedicated with relics; this is evident from the emphasis upon the procuring and placing of relics which is found in most of the dedication letters. Throughout, the emphasis is upon the relics of martyrs: St. Peter—*Epp.* vi, 22.48; viii, 5; ix, 71.233; St. Paul, *Epp.* vi. 48; ix, 183; St. Agatha—*Ep.* i, 52; St. Stephen —*Epp.* ii, 9; vi, 43; St. Pancratius—*Epp.* ii, 9; vi, 48; ix, 165. 183. 233; St. Euplus—*Ep.* ii, 9; St. Lawrence—*Epp.* vi, 22. 48; ix, 233; St. Hermas—*Epp.* viii, 5; ix, 49. 165; St. Sebastian —*Epp.* viii, 5; ix, 165; 233; Saints Hyacinth and Maximus— *Ep.* ix, 49; St. Savinus—*Epp.* ix, 58; xiii, 18; St. Juliana— *Epp.* ix, 180. 181; St. Cyriacus—*Ep.* ix, 165; St. Agnes—*Ep.* ix, 233; St. Ermetis—*Ep.* ix, 233; St. Paul—*Ep.* viii, 5; St. John —*Ep.* viii, 5; ix, 183. When St. Gregory bade St. Augustine purify the pagan temples and dedicate them to Christian worship, he added that relics of martyrs were to be used, but did not specify the relics of any particular saint. As a general rule, the relics of more than one martyr were placed in one church. An exception to this is found in three cases[218] where the relics of only one martyr are mentioned: St. Stephen's basilica in *Ep.* vi, 43; oratory of St. Savinus in *Ep.* ix, 58; the monastery of St. Savinus in *Ep.* xiii, 18. Only the relics of one martyr, St. Juliana, are mentioned in *Ep.* ix, 180, but the oratory in question was to receive also the relics of St. Severin, a confessor, and was to be dedicated in honor of both saints.

It is evident that there was no law existing at the time of Gregory that the relics of martyrs only were to be used in the dedication of churches or oratories or monasteries. Further evidence of this fact may be gathered from *Epp.* ii, 15 and xi, 19. In the former, Bishop Castorius of Rimini is told to dedicate an oratory in honor of the Holy Cross, in which he is also to place relics. Presumably relics of the true Cross are here meant, though there is no explicit statement to that ef-

[218] Regarding the relics of St. Agatha, which alone are mentioned in *Ep.* i, 52, as being placed in the monastery of St. Stephen, cf. *supra*, p. 348.

fect in the letter, for no other relics are mentioned. It must be noted, however, that the oratory was later known as the "Monastery of the Holy Cross and of Saints Cosmas and Damian." [219]

The second letter, *Ep.* xi, 19, is written to Bishop Pascasius of Naples and requests him to give to Venantius relics of the confessor, St. Severin, so that an oratory he has built in that saint's honor may be solemnly consecrated. Only the relics of St. Severin are here mentioned. These observations show that the practice at the time of Pope Gregory was in conformity with the practice of earlier times, a brief account of which has already been given.[220]

In the letters that treat of relics in connection with the dedication of various places, Gregory apparently makes no distinction between the use of the words "reliquiae" and "sanctuaria." Either word or both appear in sixteen letters as follows: in eight letters the word "sanctuaria" alone occurs;[221] in four letters the word "reliquiae" alone occurs;[222] in three, both words occur in such a way as to indicate clearly that "sanctuaria" which in the three instances occurs later in the letter, refers back to "reliquiae;" [223] in another letter the two words follow each other: "reliquiarum sanctuaria."[224] However, one must not conclude that the words are strictly identical in meaning: "reliquiae" signifies actual relics, i. e., remains of the saint's body; "sanctuaria" properly refers to things used by the saint during life or sanctified by contact with his tomb or relics; the word may refer to the container, usually of some precious metal or material, in which relics

[219] Cf. Ewald's note 1 ad *Ep.* ii, 15. Gregory sent relics of the true Cross to King Reccared (*Ep.* ix, 226), and to Adaloald, son of Queen Theodolinda (*Ep.* xiv, 2.)

[220] Cf. *supra,* pp. 186-190, esp. note 28, p. 189.

[221] *Epp.* ii, 9. 15; vi, 22; ix, 45. 58. 71. 180. 181.

[222] *Epp.* iii, 19; iv, 8; vi, 48; xi, 56. Cf. *supra,* p. 189, n. 28

[223] *Epp.* i, 52; ix, 49. 183.

[224] *Ep.* vi, 43.

were kept.[225] Gregory uses the word "beneficia" in numerous instances as a synonym for relics, but it does not occur in any of the letters under consideration here.

Summary

From the study of Gregory's dedication letters we may make the following summary: 1) Gregory's letters refer to a dedication rite over and above the celebration of a dedicatory Mass. 2) Churches, baptistries, oratories, monasteries and monastic oratories were to be dedicated; Gregory's letters contain no law that all places were to be dedicated. 3) On one occasion the dedication was ordered to take place on a feast day, probably the feast of the Assumption of the Blessed Virgin—the day of dedication itself was a feast day, a day of rejoicing. 4) Formula XI of the *Liber Diurnus* was in existence before the time of Gregory the Great, and his letters could not have been the source whence this Formula was derived. 5) Formulas XII, XV, XVI and XIX come apparently from Gregory's letters. 6) The nine letters written according to Formula XI grant permission to a bishop subject to the Pope as metropolitan of the Roman province to dedicate a particular place a) if the building is in the bishop's diocese; b) if no body is buried there; and c) if the donation is legal and provides sufficient endowment. 7) Only in one letter does Gregory prescribe that the founder, a deacon, is not to have any rights "nisi processionis gratia," which phrase indicates the right of going in solemn procession to Mass; no right of precedence is indicated. 8) In two instances Gregory grants the founder the usufruct of part of the donation made for the founding of a church or an oratory. 9) Two churches that had been held by Arians were recovered during the Pon-

[225] The latter meaning is that given by Garnier: "Sanctuaria porro sunt ipsae sanctorum reliquiae, vel potius reliquiarum thecae, vel, ut aiunt, reliquiaria."—Rozière, *Liber Diurnus*, p. 41. Ewald, in interpreting "reliquiarum sanctuaria", agrees with Garnier; cf. note ad *Ep.* i, 52. Perhaps that interpretation is correct; the writer prefers to believe that the "reliquiarum sanctuaria" are things sanctified by contact with the relics or tomb of the saint. Cf. *supra*, p. 188f.

tificate of Gregory and were dedicated, presumably for the first time. 10) A church that had been destroyed by fire was rebuilt and dedicated, but it is not known whether it had been previously dedicated or not. 11) There is no indication in Gregory's letters as to the number of altars regularly built in a church. 12) Contrary to the Pope's orders, the Bishop of Palermo consecrated a synagogue which he had confiscated from the Jews; the Pope ordered the bishop to pay for the synagogue and its lands, since a place once consecrated could not be returned to non-Christian uses. 13) Pagan temples need not be destroyed; if they are well-built, they may be purified and dedicated to Christian worship. 14) When there was question of an oratory that was to remain strictly private, the following prohibitions were added to the permission to dedicate it: a) it was to be consecrated "absque missis publicis;" b) no baptistry was to be constructed therein; c) no cardinal priest was to be appointed—these same prohibitions were understood in the case of monastic oratories; these latter were not to be open to public services. 15) In one instance Gregory, forseeing that the oratory would become a baptismal church, omitted the prohibitions against public Masses and a baptistry, and told the bishop to install a cardinal priest. 16) The religious, in the case of a monastic oratory, and the founder of a private oratory were to request the local bishop to provide a priest if they wished to have Mass celebrated. 17) The bishop of the diocese alone had the right to dedicate places in his territory—if another did so without proper permission, the oratory was placed under the care of the diocesan bishop. 18) Though he has the right to dedicate monasteries and monastic oratories in his diocese, the bishop is not to interfere in the government of the religious; whatever the faithful offer is reserved to the religious and not to the bishop. 19) Pious wills providing for the foundation of religious places are to be carried out without delay; it is the bishop who must provide for this. 20) Only the bishops of Italy and the adjacent islands asked for and received permission from the

Pope to dedicate a place in their territories, but if such bishop were a metropolitan, such permission was apparently not required. 21) Relics were used in most dedications, though not in all; they were placed in churches, altars, baptistries, oratories and monasteries; the relics of martyrs were preferred, though the relics of confessors also were used. 22) From Gregory's use of the words "reliquiae" and "sanctuaria" one may conclude that, in general, he upheld the Roman custom of not transferring or dismembering the actual remains of the saints but of substituting things sanctified by the saint's use or by contact with the saint's relics or tomb.

JOHN A. EIDENSCHINK

ST. JOHN'S ABBEY,
COLLEGEVILLE, MINNESOTA

"Christianity is not the legal religion of the state as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that it is in fact, and ever has been, the religion of the people. This fact is everywhere prominent in all our civil and political history, and has been, from the first, recognized and acted upon by the people, as well as by Constitutional Conventions, by Legislatures, and by courts of justice"—*Lindenmuller v. People* (1861), 33 Barb. (N. Y.), 548, 561.

NON-SOLEMN BAPTISM AND DETERMINATION OF RITE

I. Basic Principles regarding Non-solemn Baptism

BAPTISM is the sacrament by which men "are made partakers in the divine nature," [1] and, as a consequence, members of the Church. Now membership in the Church entails the subordination to a legal sphere which is fundamentally determined by the *ritus* to which the Catholic belongs. Thus, baptism is, as a rule, also instrumental for deciding to which law system of the Church the baptized person will be subject as a member of the Church.[2]

This attachment to a particular rite, and, therefore, to a particular discipline of the Canon law is considered by the Church of so great an importance that the person to be received into the Church is to be baptized according to the ceremonies of the rite to which the newly baptized shall belong. It is also prescribed that exceptions from this rule do not necessarily change the ritual status of the *baptizandus*.[3]

It must be admitted that the canonical norms are not entirely free from exceptions, partly caused by the *ius particulare*, partly by the omission of special provisions which open the field for interpretations and theories. This is the case of problems concerning the determination of rite in connection with baptism, in general.

Our analysis is concerned only with such questions which can come up in connection with private baptism.

Baptismus non sollemnis — usually, although not entirely correctly, called private baptism—is bestowed when the administration of the sacrament is reduced to the most essential

[1] Eugene Boylan, *Difficulties in Mental Prayer* (1944), p. 70.

[2] Willibald M. Plöchl, "The Fundamental Principles of the Philosophy of Canon Law"—The Jurist, IV (1944), 76.

[3] Can. 98, § 1; can. 756, § 1, § 2; can. 87.

requirements of matter, form and intention, in contradistinction to *baptismus sollemnis*, which takes place according to the ceremonies prescribed by the rituals of the Church.[4] The Code designates the *sacerdos* as the *minister ordinarius*, reserving the right to officiate *primo loco* to the pastor,[5] while the deacon is the *minister extraordinarius* of the solemn ceremony.[6] In the case of private baptism every person may validly administer the sacrament when he has the right intention, applies the necessary matter and uses the essential elements of the form. But here, too, the Code gives preference to a priest, a deacon and a subdeacon in the hierarchical order of their availability, preferring also a cleric to a lay person and a man to a woman, unless the woman knows the form better than the man, or unless decency or some other equally serious reason indicates a preference for her, in which case the woman is preferred even to a priest.[7]

The faculty of lay persons to baptize privately is not restricted to Catholics, but every human being whatsoever who possesses both the sufficient use of reason for forming the necessary intention and also the capability of applying the matter and form can administer the sacrament validly.[8] Thus even an unbaptized person, when fulfilling the aforesaid conditions, can validly administer the sacrament.[9]

The apparent purpose of the *baptismus non sollemnis* is to administer the sacrament under circumstances in which the

[4] Can. 737, § 2. Cum ministratur servatis omnibus ritibus et caeremoniis quae in ritualibus libris praecipiuntur appellatur sollemnis; secus, non sollemnis seu privatus.

[5] Can. 738, § 1,—Joseph Francis Waldron, *The Minister of Baptism*, The Catholic University of America, Canon Law Studies. n. 170 (Washington, D. C.: The Catholic University of America Press, 1942), 71 ff.

[6] Can. 741.

[7] Can. 742, § 1, § 2, § 3. As to the question of precedence on the part of the parents in relation to the right of a pagan, a Jew, or a heretic to confer baptism, cf. Waldron. *op. cit.*, 135.

[8] Conc. Trident., sess. VII, *de baptismo*, can. 4. Cf. Waldron, *op. cit.*, 131-132.

[9] For the problem of true intention cf. Waldron, *op. cit.*, 145 ff.

requirements of a *baptismus sollemnis* cannot be fulfilled. The Church is not—and never has been—in favor of private baptism,[10] and accordingly restricts its application. While there is no doubt with regard to the validity of the *baptismus non sollemnis,* even though it was administered in cases wherein *baptismus sollemnis* should have been conferred, the licitness of its administration is considerably restricted in the law. As a rule, there must be danger of death, not necessarily immediate or proximate. There is only a basic agreement among the authors concerning the interpretation of the degree of mortal danger.[11] However, since this question has no essential bearing on our problem, it can be disregarded here.

Extra mortis periculum, the administration of private baptism, may pe permitted by the ordinary only in cases of a conditional reiteration of the baptism of adult heretics.[12] It is disputed whether the administration of such a private baptism is reserved to priests and deacons only. The Code is silent on the question.[13]

If a priest or a deacon is available, and if circumstances permit it, the actual conferring of private baptism should be followed by those ceremonies *quae baptismum sequuntur.*[14] Furthermore all ceremonies which were omitted in the private administration of the sacrament for any reason whatsoever, should be supplemented later in church, except in the cases of a conditional reiteration of the baptism of adult heretics.[15]

These are the fundamentals regarding the *baptismus non*

[10] Joseph Bingham, *The History of Lay Baptism,* Vol. IX of The Works of the Reverend Joseph Bingham (1885); Jules Corblet, *Histoire du Sacrament de Baptême,* 2 vols. (1881); Waldron, *op. cit.,* 12-16, 36-37, 53-57.

[11] Can. 759, § 1. Cf. Waldron, *op. cit.,* 136-137. Regarding tolerated customs of baptizing privately outside of danger of death cf. Felix M. Cappello, S.J., *Tractatus Canonico-Moralis de Sacramentis,* Vol. I, 3. ed. (1938), 177.

[12] Can. 759, § 2.

[13] Waldron, *op. cit.,* 130-131. We do not share the opinion of restrictive interpretation.

[14] Can. 759, § 1.

[15] Can. 759, § 3.

sollemnis. Within the aforementioned limits, as set by canon 759, private baptism can be conferred not only validly but also licitly.

As to the essential requirements of the matter, the form and the intention, our present interest centers primarily in the question of the form. Goodwine says that the form employed in baptism must express five distinct and essential elements if it is to render valid the sacramental act. He lists them as follows: [16]

1. The person baptizing, by either explicit or implicit declaration.[17]
2. The act of baptizing.
3. The person being baptized.
4. The unity of the divine nature.
5. The Trinity of Persons, designated explicitly and distinctly.

The Church does not impose a uniform formula to be used exclusively in the administration of the sacrament. There is first of all the remarkable distinction between the so-called (active) Latin formula: "I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost," and the (passive) formula used by most of the Orientals, and which fundamentally reads as follows: "The servant of Christ is baptized in the name of the Father and of the Son and of the Holy Ghost." The equality of both formulae is recognized in the Constitution of Eugene IV (in the Council of Florence), *Exultate Deo.*[18]

[16] Joseph G. Goodwine, *The Reception of Converts,* The Catholic University of America, Canon Law Studies, n. 198 (Washington, D. C.: The Catholic University of America Press, 1944), 32; Benedictus Henricus Merkelbach, *Summa Theologiae Moralis,* Vol. III, 3. ed. (1942), 106.

[17] The omission of the first personal pronoun does not invalidate the baptism conferred in those languages in which it either does not exist or need not necessarily be used in order to determine the acting person. It must be used however, in all languages in which the omission of the personal pronouns would render the sentence incomplete.

[18] 22 nov. 1439, n. 10—*Fontes* I, 52.

However, aside from those formulae which are to be found in the rituals approved by the ecclesiastical authorities, there is a considerable variety of formulae in use among Latins as well as among the various Oriental rites which are nevertheless recognized as valid.[19] For all these formulae, and for any special analysis of any formula whatsoever, the general principle ruling the interpretation of the validity is according to Goodwine: [20] an essential or substantial change of the words of the form renders the sacrament invalid; an accidental change, though illicit, does not invalidate the sacrament. The change of the form of baptism is an essential change when the same sense, as conveyed by the valid form, does not remain; the change is accidental when, despite slight changes, the same sense does remain. The sense of the valid form is destroyed when the form which is used does not contain those elements which necessarily must be expressed, or when there is present some false or heretical meaning.

These considerations are of importance for our problem, for various reasons.

The cardinal principle expressed in these rules is that the validity of baptism depends—aside from the question of the matter and the intention—on the existence of those elements in the performance of the act of ministration which are fundamental. It is — principally considered — not the use of the standard formula *per se,* but the observance of all the essentials in the performance of the act of baptizing, that makes the baptism to be valid. It is obvious that the Church puts emphasis on the use of the form as prescribed in the rituals, particularly in the case of solemn baptism, in order to eliminate all possible doubts of validity, but a canon in the Code likewise stresses the requirement that in the case of private baptism *ea tantum ponantur, quae sunt ad baptismi validitatem necessaria.*[21] The replacement of the form prescribed in

[19] For a good outline and survey, also with regard to the opinions of the various authors, cf. Goodwine, *op. cit.,* 32-34.

[20] *Ibid.,* 32.

[21] Can. 759, § 1.

the ritual by another valid form in the performance of an act of solemn baptism would render the act illicit, but it would not affect the validity of the baptism if all *essentialia* were fulfilled.

This brings up another aspect of the problem. While both the ordinary and the extraordinary ministers of solemn baptism are bound to proceed in accordance with the prescriptions of the rituals of their respective rites in order to render the baptism not only valid but also licit, there is, in our opinion, no restrictive norm which binds the minister of the non-solemn baptism to use a particular formula, or prohibits to him the use of certain formulae. This seems to be definitely clear not only from the provisions of canon 759, § 1, but also from the aims of these provisions, namely to assure the administration of the sacrament under the particular circumstances, and to make it possible that any person who is able and willing to fulfill the *essentialia* of the act can validly and licitly administer the sacrament. We do not share, therefore, the opinion of Cappello who holds—without suggesting any legal provision in support—that the use of the Greek form *pro Ecclesia latina certe illicita foret.*[22]

II. Observance of Rite and Ceremonies in Non-solemn Baptism

At this point we meet the important question: To what extent does private baptism affect the future status of the (legal) rite or discipline of the baptized? As already mentioned, it is a norm that the *baptizandus* should be baptized according to the ceremonies[23] of the (legal) rite to which he

[22] *De Sacramentis*, I, 135.

[23] The language of the Code offers various difficulties owing to the fact that the term "*ritus*" is used in too many different meanings; cf. Rudolf Köstler, *Wörterbuch zum Codex Iuris Canonici* (1927), s. v. "*caeremoniae*", "*ritus*"; Klaus Mörsdorf, *Die Rechtssprache des Codex Juris Canonici*, Görres-Gesellschaft, Veröffentlichungen der Sektion für Rechts- und Staatswissenschaft, 74. Heft (1937), 241 ff. For an analysis of "*ritus*" cf. Aemilius Herman, "*De 'ritu' in iure canonico,*"—*Orientalia Christiana*, XXXII (1933), 96-158; also Aemilius Herman, "*De conceptu 'ritus',*"—The Jurist, II (1942), 333-345.

will belong. Thus, as a rule, the ceremonies in which baptism is performed are an indication of the *ritus* to which the Catholic belongs, unless one of the cases mentioned in canon 98, § 1, creates an exception.

This norm certainly holds good in relation to solemn baptism. It appears, however, that the norm is applicable in relation to it alone. This is so inasmuch as the law does not prescribe the observance of any particular ceremony for private baptism administered in mortal danger, which ceremony would indicate the (legal) rite of the *baptizandus*. The law stresses simply the unrestricted observance of the *essentialia* of baptism which are common to all rites of the Church. Thus, private baptism *per se* disregards the question of (legal) rite. This is in full accordance with its primary purpose of making a person to be a partaker in the divine nature. It is an emergency baptism to assure the *bonum divinum*, and thus abstracts from the legal consequences of the act of baptism.

This is in itself no deviation from the general rule that baptism should be administered in accordance with the ceremonies of a particular rite, for private baptism does not call for the observance of such ceremonies, but is, so to say, ceremony-free. This does not, therefore, upset the general rule. This also does not affect the status of the rite of the privately baptized person. The (legal) rite of a Catholic is not determined by the ceremonies of baptism, but the ceremonies—if they have to be observed—should be in conformity with the already determined rite of the *baptizandus*. To which rite a future Catholic will belong depends on the law, and in certain cases on the will of the *baptizandus* or of his parents. Thus the fact that private baptism lacks the indication of the rite in view of the non-use of solemn ceremonies has no bearing on the ritual status of the person. The lack of such indicative ceremonies can complicate at times the actual determination of the rite, but even the use of solemn ceremonies in baptism likewise does not, in and of itself, offer

any unmistakable or definite assurance regarding a Catholic's real ritual status.

The question of ceremonies in a private baptism arises only in two instances. One instance is mentioned in canon 759, § 1. There it is stated that, if a priest or a deacon is the minister of private baptism in mortal danger, the ceremonies which follow baptism should be observed, *si tempus adsit*. Waldron [24] is right when he notes that these additional ceremonies do not render the baptism solemn. In immediate connection with an administered private baptism the law makes no demand whatsoever for the supplying of those ceremonies which precede baptism. It is clear from the rule of canon 98, § 1—which rule in our opinion holds good also with reference to the supplementary ceremonies employed in private baptism — that under ordinary circumstances the priest or deacon of the proper rite should proceed according to the prescription of the respective ritual. If in case of grave emergency only a priest or a deacon of another rite would be present, and the circumstances would not allow holding off the private baptism until the arrival of a priest or a deacon of the proper rite, then likewise the clerical minister present has to proceed according to his own ritual. Such procedure would not only not be illicit, but it would likewise not constitute any change of rite. It should be added here that if an Oriental priest who enjoys the faculty or the privilege of administering the sacrament of confirmation were the minister of the private baptism of a person who pertains to a rite in which the use of such a faculty is excluded, the sacrament of confirmation could not be licitly administered.[25]

It is also clear that the ceremonies which according to canon 759, § 3, are to be supplied *quamprimum in ecclesia*, namely, after the private baptism which was conferred in

[24] *The Minister of Baptism*, 130, footnote 1.

[25] Can. 782, § 5. Nefas est presbyteris ritus orientalis, qui facultate vel privilegio gaudent confirmationem una cum baptismo infantibus sui ritus conferendi, eandem ministrare infantibus latini ritus.

time of mortal danger, should be performed in accordance with the aforementioned principles.

The other instance in which the question of ceremonies in a private baptism arises is, according to canon 759, § 2, in the case of conditional adult baptism. The occurrence of this case postulates first of all on the permission of the local ordinary, and secondly also his prescription regarding the use of ceremonies for this occasion. Here, too, it can happen that the rite of the minister of baptism does not coincide with the future rite of the *baptizandus*. We shall discuss the juridical consequences of this possibility later.[26]

Thus, in summing up all our considerations on this problem, we arrive at the following conclusions:

The lay minister of a private baptism conferred in mortal danger is bound to observe only the essentials of the matter, the form and the intention. Thus, the actual ministration of the non-solemn baptism is valid and licit if these essentials are fulfilled. There are no prescriptions which call upon such a minister to follow the ecclesiastical rituals in performing these *essentialia*. If, however, subsequent to the act of private baptism, ceremonies are to be performed, they should be supplied in accordance with the ritual prescriptions of the rite of the thus baptized person. If in a case of necessity a priest of another rite is performing these ceremonies, he has to preceed according to his proper ritual. These principles regarding the use of baptismal ceremonies apply also to cases of the conditional private baptism of adults according to canon 759, § 2.

III. Determination of Rite in the Case of Non-solemn Baptism

The other major problem of our analysis concerns the following question: What principles and rules must be observed to determine the (legal) rite of a privately baptized Catholic? We are subdividing our discussion, in conformity with the distinction employed in the Code, into the cases

[26] *Infra*, p. 388.

which arise from private baptism in mortal danger, and in those which arise from private conditional baptism of adult heretics. The cases resulting from a non-solemn baptism in mortal danger have to be subdivided further into the baptism of children, and the baptism of adults.

1. LEGITIMATE CHILDREN

If both parents belong to the same Catholic rite, the child which is privately baptized in mortal danger follows the rite of the parents.[27] In case the rite of the parents was changed *de facto* without authorization,[28] or if the parents were baptized in another rite and then followed this rite without a proper transfer of rite, the child still belongs to the original rite in which the parents should have been baptized,[29] or from which they were not authorized to depart.

In case the parents belong to different Catholic rites, the child, as a rule, belongs to the rite of the father, *nisi aliud iure speciali cautum sit*.[30] The exceptions concern Italo-Greeks, in which case the children may be baptized in the Latin rite of the mother, if the Greek father consents; [31] and the Ruthenians in Galicia, in which case the legitimate daugh-

[27] Can. 756, § 1.

[28] The unauthorized change of rite has no effect in law, neither for the person in question, nor for his offspring. An unauthorized change of rite is void of its intended juridical effects, but it can entail certain other juridical consequences. E. g. the S. C. S. Officii established on August 3, 1639 (*Fontes*, IV, 7, n. 725) that persons who transferred without permission from the Latin to the Greek rite could be absolved only if they had received or at least intended to receive a dispensation for the transfer. For other examples cf. Hugo Dausend, *Das interrituelle Recht im Codex Iuris Canonici*. Görres-Gesellschaft, Veröffentlichungen der Sektion für Rechts- und Staatswissenschaft, 79. Heft (1939), 150, 153.

[29] Commissio pontificia ad Codicis canones authentice interpretandos, 16 oct., 1919 ad XI—*AAS*, XI (1919), 478.

[30] Can. 756, § 2.

[31] Benedictus XIV, const. *Etsi pastoralis*, 26 maii 1742, § II, n. X: Si vero Pater sit Graecus et Mater Latina, liberum erit eidem Patri, ut Proles, vel ritu Graeco baptizetur, vel etiam ritu Latino, si Uxor Latina praevaluerit, id est si in gratiam Uxoris Latinae, consenserit Graecus Pater, ut Latino ritu baptizetur.—*Fontes*, I, n. 328, 738.

ters and the illegitimate children follow the rite of the mother, the legitimate sons, however, follow the rite of the father. In case the father is a Ruthenian priest, all children follow his rite.[32]

We are of the opinion that the principal rule, namely, that the child follows the father's rite, is also valid if the child is born posthumously, in spite of the fact that Michiels,[33] Sipos [34] and Dausend [35] advance the idea that in such a case the father's rite would be disregarded. We believe that the essential determinant is not whether the father is alive or dead at the time of the child's birth, but whether or not he is the father of the posthumously born offspring. To deny to the posthumous child the rite of the father could even raise doubts regarding the status of its legitimacy.[36] Aside from this consideration there exists a particular law which establishes this principle at least for the Syrians. According to their norms the offspring must never be ascribed to the rite of the mother, even if the father is dead, or is absent for a considerable length of time.[37]

If only one parent is Catholic, the child follows the rite of the Catholic party in the marriage.[38]

One can consider other cases for which the aforementioned norms do not make any provision. What should be done for instance, if both parents are non-Catholics but want their child to be baptized a Catholic? We feel that if both parents express their desire to see their child belonging to a particular Catholic rite, or even if only one of the parents expresses such a wish in the absence of interference by the other, such an

[32] S. C. de Prop. Fide, decr. 6 oct. 1863, D), c), e),—*Fontes,* VII, n. 4859, 397, 398.

[33] Gomarus Michiels, *Principia generalia de personis in Ecclesia* (1932), 277.

[34] Stephanus Sipos, *Enchiridion iuris canonici,* 3. ed. (1936), 93.

[35] *Das interrituelle Recht,* 87-88.

[36] *Infra,* 374 ff.

[37] "Nusquam licet eam in ritu matris accenseri etiamsi mortuo patre eam peperit, aut eius pater diu fuerit absens."—Acta Synodorum (1897), 55.

[38] Can. 756, § 3.

intention should be taken as a decisive factor for the determination of the rite of the child.

We shall illustrate this case by means of an example: An Orthodox couple has some inclination toward returning to the Catholic Church. While they are still undecided for themselves they agree that the expected child shall be baptized a Catholic, but that it shall follow the Catholic rite which corresponds to their own dissenting church affiliation. The child is born in a Catholic maternity hospital, but, since there is danger for the life of the baby, it is baptized by a nurse who belongs to the Latin rite.

We think that the parents' intention should be respected. We are basing this opinion on the following considerations: It is an accepted principle that the *adultus* of non-Catholic parentage is free to express his preference for a particular rite of the Church when he receives baptism and thereby enters the Church.[39] Thus it is possible that even a non-Catholic can have a decisive influence on the determination of his rite. The Code very definitely stresses the point that the consent of the non-Catholic parents for the baptism of their offspring must be obtained,[40] and makes the lawfulness of the child's baptism *invitis parentibus* dependent on the condition "*ut prudenter praevideatur moriturus, antequam usum rationis attingat.*" [41] It is also clear that the *minor in exercitio suorum iurium potestati parentum vel tutorum obnoxia manet.*[42] Thus there can be no doubt that the parents' desire to have their child inducted into a particular rite should be respected.

It must be emphasized here that this conclusion applies only to cases in which the parents are *ab origine* heretics or schis-

[39] Dausend, *op. cit.*, 91.

[40] Can. 750, § 2. The wording "extra mortis periculum, dummodo catholicae eius educationi cautum sit, licite baptizatur: 1. Si parentes vel tutores, aut saltem unus eorum, consentiant," cannot be interpreted as if the Church disregarded the parents' consent completely in private baptism. On the contrary, the parents' co-operation is the rule, of which can. 750, § 1, is the only lawful exception. Cf. Waldron, *op. cit.*, 78 ff.

[41] Can. 750, § 1; can. 751.

[42] Can. 89; can. 1648, § 1.

matics. Apostate parents cannot be granted the same option. In this latter case the offspring is to follow automatically the Catholic rite of the parents, according to the already discussed norms.[43]

At what point of time must the intention of the non-Catholic parents, namely, to have their child inducted into a particular rite, be expressed? Considering the exceptional circumstances, which can call for the private baptism of a child,[44] we believe that the parents' option should continue up to the time when the child is offered in church to a priest or a deacon for the supplying of the ceremonies. Since we hold that the act of private baptism alone is not of decisive influence on the rite of the *baptizatus*, we feel justified in suggesting this extended time limit. The ministering priest or deacon should of course belong, as a rule, to the rite which the child is to follow, unless a *gravis necessitas* would necessitate a request for the services of a priest or a deacon of another rite.[45] In the latter case it will be particularly necessary on the part of the parents to determine the (legal) rite to which the child is to belong.

We also feel that the intention of the minister of private baptism (regardless of his clerical or lay status) concerning the rite of the *baptizandus* is irrelevant if the baptism in mortal danger is administered with the consent of the non-Catholic parents. It is also irrelevant whether or not at the time of the private baptism the minister knew of the parents' desire to have their child pertain to a particular rite. It is essential, however, that the parents make their preference

[43] The apostate in returning to the Church is not granted any option in determining his rite. He must follow the rite from which he previously broke away. Cf. S. C. de Prop. Fide, decr. 20 nov. 1893—*Fontes*, VII, 293, note 1 to n. 4777.

[44] E. g. dangerous childbirth.

[45] We refer in this connection to the opinion expressed by Rev. Joseph F. Waldron: "If the child were baptized in the hospital because it appeared to be in danger of death, it appears that the pastor of the territory in which the hospital is situated does not in view of this fact acquire the right to supply the ceremonies." — "Hospital Baptism,"—The Jurist, III (1943), 590.

known before the time the ceremonies are being supplied, otherwise it could well be assumed that their desire is in agreement with that of the officiating priest.

The only possible exception to the application of this principle is had when the parents claim and can prove that the ceremonies were supplied without their knowledge before they had an opportunity to express their preference regarding the rite to which the child is to belong. But the parents should, upon being informed of the situation, establish their claim without delay in order that it may be morally connected with the case. Such a rectification when undertaken by the priest should not be considered as implying a transfer of rite on the part of their child, but rather as effecting a determination of a not yet definitely decided situation.[46]

The same rule should be appilied, in our opinion, to cases in which the child was baptized *non invitis parentibus*, but under the mistaken assumption that the parents did not or would not consent to the baptism of their child which was in danger of death. It is clear that the minister acted under a wrong impression, even if this impression seemed to him true and justified under the prevailing circumstances. This same principle seems to obtain also then when the death of the child is apparently imminent, but neither of the parents can be reached, or neither of them is in a condition to permit a discussion of the problem.[47]

The last type of possible cases is exemplified in the following situation: The child was baptized *invitis parentibus*, since it was definitely understood that they were opposed to the baptism of their child in the Catholic Church. Baptism was nevertheless administered when the death of the child was assumed to be imminent, but eventually the child survived. To which rite does the baptized child belong?

[46] If the supplying of the ceremonies was already recorded by the officiating priest, the competent pastor should be informed at once, when the circumstances of the parents' expressed preference regarding the rite to which the child is to belong has been duly certified.

[47] E. g. the mother is unconscious, and the father is not available.

The responsibility for deciding upon the advisability or the obligation of conferring baptism rests in such a case with the person who actually administers the sacrament.[48] The question of the determination of the (legal) rite must therefore be decided by someone other than the parents.[49] In the absence of any particular intention on the part of the minister it is to be assumed that the child will follow the rite of the minister, unless the surrounding circumstances give indication otherwise.[50] Nevertheless it should not be overlooked that the problem of the determination of the rite can remain an important pending issue until the private baptism is eventually integrated by means of the supplying of the ceremonies as prescribed in the Code.[51]

The possibility for non-Catholic parents to influence the determination of rite under these circumstances could likewise become actualized if the fulfillment of their expressed preference for a particular rite is made the condition of their parental consent for the Catholic education of the child.

While all the foregoing considerations were based on the assumption that the child actually survived the mortal danger, we have also to investigate those cases in which the child dies before the supplying of the ceremonies can be or actually is

[48] Cappello, *De Sacramentis*, I, 150.

[49] There can be no doubt that even in such cases the proper determination of the (legal) rite of the Catholic is an essential matter, even if the fact of reaching this determination is fraught with additional difficulty. A Catholic can not be "riteless" that is to say he cannot simply be a Catholic and at the same time lack affiliation with a particular rite, for it is the (legal) rite which determines the Catholic's relations to the law of the Church. Cf. can. 87, and can. 98.

[50] E. g., a Catholic nurse belonging to the Maronite rite, but living in a Latin rite community, would not be baptizing a dangerously sick child of non-Catholic parents, whether with or without their knowledge, consent or desire, necessarily affiliate the child with the Maronite rite. Family background, local tradition, Catholic education, etc., are all circumstances which can and should be taken into consideration for the final determination of rite.

[51] We believe that this rule holds good also in cases in which there is a considerable lapse of time between the conferring of the private baptism and the later supplying of the ceremonies.

accomplished. Here we have to distinguish between a baptism conferred with the parents consenting and a baptism conferred *invitis parentibus*. It is obvious that in either case the determination of the rite is of relatively minor importance. We shall, nevertheless, undertake to offer a solution.

If the parents consented to the private baptism and expressed a preference for a particular rite, either before or proximately upon the death of the child, their desire should be respected similarly as in the aforementioned cases. If they failed to express their wish, it should be assumed that the infant belonged to the rite according to which it was buried.[52]

If the child was baptized without the parents' consent, and died subsequently then the question of rite is of course only of nominal importance. The rules suggested for the determination of rite with reference to the case of a private baptism *invitis parentibus* for a later surviving child should be applied accordingly.

2. ILLEGITIMATE CHILDREN

The principles and rules with regard to the determination of the (legal) rite of legitimate children whose baptism was non-solemn constitute also the basis for the present consideration. As to baptism and rite the law makes in general no differentiation between legitimate and illegitimate birth. An exception to this general rule is made by particular law in only a few matters, as will be seen below.

Thus, if both parents are Catholics and also of the same rite, the illegitimate children follow the rite of their parents.[53] The law is obviously identical with that which deals with the baptism of children who are of legitimate birth.[54]

If the parents belong to different rites, the rule of canon 756, § 2, is applicable. Thus, according to general rule, the

[52] Can. 1205, § 1; can. 1216, § 1, § 2; can. 1217.

[53] C. De Clercque, "De ritu et adscriptione ritui apud Orientales catholicas,"—*Ephemerides liturgicae*, XLVI (1932), 473-480.

[54] This includes, therefore, also the problems arising from illicit change of rite, etc.; cf. *infra*, p. 376, 377.

illegitimate child follows the rite of the known father, a norm which also includes the posthumously born child. There are several exceptions established by particular law. The illegitimate children of Ruthenians follow the rite of the mother.[55] This same principle was also incorporated in the decree *Cum data fuerit*[56] and *Graeci Rutheni Ritus*[57] for the Catholics of the Byzantine-Slavonic discipline in the United States and in Canada, who are under the jurisdiction of their own ordinaries.[58]

The question arises how the rite should be determined if it is not known, or not duly revealed, who is the father of the child. The Code prescribes that the name of the father of an illegitimate child should be recorded in the baptismal register only, *dummodo ipse sponte sua a parocho vel scripto vel coram duobus testibus id requirat, vel ex publico authentico documento sit notus.*[59]

That there cannot be any recording of the father's name is a natural consequence of the fact that it is definitely unknown, who is the father, for then it is simply impossible to determine his personal status of fatherhood and consequently also the identity of his rite. However, the same principle applies necessarily also to the cases in which his paternity is not duly revealed, for then, too, his name may not be recorded in the baptismal register, even if the fact of his fatherhood should be secretly known to one or more persons.[60] It would militate against the purpose of the provision which enables the party concerned not to reveal his paternity, if in the question of rite the application of this same principle did not hold. In

[55] S. C. de Prop. Fide, decr. 6 oct. 1863, D) e): "Illigitimae proles sequantur matris ritum"—*Fontes*, VIII, n. 4859, 398.

[56] S. C. pro Eccl. Or., decr. 1 mart. 1929, art. 43—*AAS*, XXI (1929), 159.

[57] S. C. pro Eccl. Or., decr. 24 maii, 1930, art. 48—*AAS*, XXII (1930), 353.

[58] Thus not only "Ruthenians," but also Oriental Croatians and Oriental Hungarians in the U. S. fall under this rule.

[59] Can. 777, § 2.

[60] Commissio pontif. ad Cod. can. auth. interpr., July 14, 1922—*AAS*, XIV (1922), 528.

reality the problem is that of the *bona fama* which universally states its prior claim.[61] We therefore hold that in all cases in which the name of the father of an illegitimate child is to remain excluded from the baptismal register, the question of the (legal) rite of the offspring is solved correctly by means of the applied rule that the illegitimate child follow the rite of its mother.

However, there are still other possible complications. What rule will obtain when the mother is indeed married, but the child is not begotten of her husband, and a determination of rite is to be made for the child? The following cases, for example, could occur:

a) The married mother is of the same rite as her husband, but the actual father belongs to another Catholic rite, and the father's rite takes precedence; [62]

b) the married mother is of the same rite as her husband, and her rite takes precedence to the rite of the actual father in regard to the determination of rite; [63]

c) the married mother's rite differs from her husband's and also from the actual father's, but her rite takes precedence in regard to the determination of the rite of the illegitimate offspring; [64]

d) the mother's rite differs from her husband's, and her rite takes precedence as in c), but the actual father of the child can not be identified.

We are inclined to believe that in all these cases the applicable norms are identical with those stated above in relation to the determination of rite for illegitimate offspring. The cases here listed certainly present the additional problems

[61] W. M. Plöchl, "The Fundamental Principles of the Philosophy of Canon Law"—THE JURIST, IV (1944), 98.

[62] E. g., the married couple belongs to the Latin rite, but the actual father of the child is a Maronite.

[63] E. g., the married couple belongs to the Ruthenian rite in the United States, but the actual father of the child is a Latin Catholic.

[64] E. g., the mother, a Ruthenian Catholic, is married to a Latin, and the actual father is also a Latin Catholic.

arising out of the violation of a marital union, however that consideration does not affect the principles governing the determination of rite. Likewise the fact that a private baptism was administered to the child when it was in mortal danger, does not change the situation. It could of course be argued that a difference of rite between the child and its mother's husband would only add to the difficult position of such a child as an outsider drawn into the family circle. However, from the viewpoint of charity, if not from that of the law, the opposite result is the one to which the greater likelihood attaches. As to the legal situation with regard to the rite, the child holds a position similar to that of the children of a previous marriage, in which the fact of the mother's later marriage with a Catholic of a different rite does not affect the ritual status of the children of her earlier marriage.

It may be asked whether the child's legitimation, its adoption by the husband of the mother, legally accorded right to bear the family name etc., in any way affects the ritual status of the illegitimate offspring. In themselves such acts do not effect a change of rite, but they would probably warrant the petition of a *venia Apostolicae Sedis ad alium ritum transire,* in accordance with canon 98, § 3.

Eventually it may be asked what should be the decision in the case in which the husband for what reasons soever pretends to be or asserts that he is the father of the child, and there exists at the same time considerable doubt about the veracity of his statement. If the statement of the husband is accepted by the pastor who then records the private baptism in the baptismal register, such a procedure would imply for the child an acknowledged legitimate status. The general rules regarding the proper determination of rite would then apply.[65]

[65] Could it not be argued that according to the rule of can. 98, § 1, such a baptism was *fraude collatus* and that therefore the contemplated rite was not of binding effectiveness? We hold that the answer to this depends in its finality on the intention of the husband and also of the mother. If the child was baptized in the rite of the mother's husband for the sake of saving the unity and the good name of the family, and also in the interests of the child

The remaining questions concerning the determination of rite which could arise in consequence of the private baptism of illegitimate children, but which are similar to the questions already discussed in connection with the private baptism of legitimate children, do not constitute any particular problems. They can be answered on the same basis with the similar question which relates to the private baptism of legitimate children.

Summarily, however, the following may be indicated: If but one of the parents is a Catholic, then the illegitimate offspring follows the rite of the Catholic party. If both parents are non-Catholic, and at least one of them desires the Catholic baptism of the child and concomitantly expresses a preference for a particular rite, then the request should be followed. If the baptism is conferred *invitis parentibus*, then the above-mentioned rules have valid applications with reference also to the private baptisms of illegitimate children.

3. FOUNDLINGS

A third class of infants, which can not be aptly included under any of the previously discussed groups, is constituted by the *infantes expositi et inventi*. The Code is silent on the question of rite, and presents but a single norm,[66] which states that *nisi, re diligenter investigata, de eorum baptismo constet, sub conditione baptizentur.*

What factors determine the rite of the foundling? As a rule, when conditional private baptism is administered the foundling should be affiliated with the rite of the person (or

in order that with the violation of the marital vows kept secret, the child will be acknowledged as legitimate, the procedure can hardly be called a fraudulent action. In our opinion there is inherent in such a situation a typical case of epikeia. However, we do not exclude all possibility of fraud. Fraud would surely be present if the father of the child persuaded the mother's husband to claim the child as his own, in order thereby to deprive the illegitimate offspring of all claims upon the natural father. In such a case the decision regarding the proper determination of rite must duly acknowledge the juridical consequences deriving from a baptism *fraude collatus* in an alien rite.

[66] Can. 749.

persons) who actually takes the place of the parents.[67] But under certain circumstances the determination of the rite which arises from this affiliation may have to be considered as being provisional, and not yet definitely final. We also feel that the relationship between the foundling and those who assume responsibility for it must be not merely accidental, but fully intentional,[68] even if only temporary. If, e. g., some one who discovered a foundling brought it to a Catholic orphanage, the relationship between the finder and the foundling would be merely accidental, and not decisive for the determination of the rite, even if the finder had baptized the child conditionally before bringing it to the orphanage. On the other hand, we also hold that even if the care given by the orphanage is only temporary, no change of rite can be effected later, e. g. when the child is adopted by foster parents.[69]

However these principles are applicable only in those cases in which the natural parents remain unknown. In other words, the rite of the foundling is established *pendente conditione* that no better evidence can be furnished to determine it definitely. If, therefore, the ancestry of the foundling can be established, and their particular Catholic rite is ascertained, it is our opinion that the general principles governing the determination of the rite of legitimate or illegitimate children must be applied. It would make no difference whether the parents deliberately abandoned the child, or whether they lost the infant in consequence of circumstances which deprived them of their freedom of action.[70] It also is irrelevant

[67] Can. 1113; can. 1372, § 2; Dausend, *op. cit.*, 88, 89.

[68] The determination whether or not parental responsibility exists legally can in given cases depend on the ruling of the civil law.

[69] Under this assumption the finder who baptizes the infant is nothing more than the minister of the sacrament, while the orphanage, or its legal representative, takes the place of the parents. One can argue that for the same reason for which the commitment of a child by its natural parents to foster parents does not induce any change of rite, a similar commitment to foster parents on the part of him who had assumed an intentionally parental responsibility for the child does not effect or occasion any change of rite.

[70] E. g. kidnapping, war, accidents.

whether the parents are dead or alive at the time their relationship to the foundling is established, for in the case of a Catholic ancestry the determination of the child's rite is to be effected independently of any consideration which looks to the actual status or condition of the persons concerned. The application of the same principle holds good also if there is a considerable lapse of time between the baptism of the foundling and the later clarification of his ancestral relationship.

In presenting this opinion we take exception to the theories advanced by Cappello,[71] and Dausend.[72] Cappello holds that in the case wherein the parents become known, and can prove their parental relation to the foundling, the rules established by Benedict XIV for the determination of the rite of the so-called *Latinizantes*[73] have to be applied. This would mean that infants and also those persons who did not reach the use of reason would follow the rite of the parents, or of the father in case of ritual difference between the parents, while those who did reach the use of reason, even though they are not adults, would be left free to decide their ritual status.

Dausend narrows the application of these norms to the present case by suggesting that also the minor who enjoys the use of reason should not be left to decide his rite, but should follow that of the parents (or father). He argues that it would destroy the unity of a family, if the choice of rite were left to the minor. He supports his argument by referring to another rule of Benedict XIV, who in his work *De Ritibus*[74] states that persons of the Melkite rite if through default of their parents they received their valid baptism only at a mature age, should not be permitted to choose their rite. This choice should be left to the discretion of the ecclesiastic authority which, in deciding the case, should take into con-

[71] *Summa Iuris Canonici,* vol. I, 2. ed. (1932), 235.

[72] *Op. cit.,* 89.

[73] Ep. encycl. "*Demandatam*" 24 dec. 1743, § 16—*Fontes,* I, n. 338, 801.

[74] *Benedicti XIV Papae opera inedita,* publ. by Fr. Heiner (1904), 3, n. 10.

sideration above all the actual or probable domicile of the thus baptized Catholic.

We feel however that neither opinion holds good at all. The norms referred to cannot actually be taken as a basis on which to render a decision for the case under consideration. Both norms—the one concerning the *Latinizantes*,[75] and the other concerning the Melkites — are not general rules, but destined to regulate particular cases. A foundling whose reception of baptism is fully assured can not be termed either a "*Latinizans*", or a person whose baptism still remains a doubtful issue.[76] The application *per analogiam* is, therefore, too far removed from being convincing.

Aside from this exception as taken here, there is a much stronger argument against these theories. It is inherent in the authentic interpretation of canons 98 and 756, as rendered on October 16, 1919,[77] which states that those who at the request of their parents, contrary to the prescription of canon 756, have been baptized by a minister of a rite not their own, nevertheless belong to the rite in which they should have been baptized. We hold, therefore, that since not even the legally unauthorized request of the parents themselves—if they are Catholics—can influence the rite, it is even more certain that those who take their place, or assume at least part of their responsibility, cannot influence the rite of the foundling if the relationship between the child and its natural parents is definitely established.

It makes no difference whether this clarification of the parents' rite occurs while the foundling has not yet reached the *annus discretionis*, or after the foundling has reached the age of a minor or of an adult. The law is strict in its demand, and the above mentioned authentic interpretation should leave no doubt that the legislator wants it to be observed to its full extent. If, therefore, after being reared in another

[75] Concerning the *Latinizantes* cf. Dausend, *op. cit.*, 82 ff.

[76] The doubt is removed inasmuch the child was baptized conditionally when it was found.

[77] *AAS*, XI (1919), 478.

rite, a foundling would actually desire to remain in this rite, even after being informed of his true ritual status, his desire could be accommodated only by means of an observance of the norms which govern the transfer from one to another rite.[78]

As to foundlings of non-Catholic parentage, we suggest the application of the following principles: If the parents had lost their child against their will, or if they abandoned the infant under circumstances which greatly diminished or almost eliminated their responsibility,[79] their expressed preference for a particular rite could be respected on the following conditions: that the child would be returned to the exclusive care of the parents, but that his Catholic education would be properly assured, if he fulfilled their wish by returning to them; and that the child has not yet reached an age at which he could choose his rite, if he were free to do so.[80]

The criterion is here the *bonum spirituale*, and the consideration that up to the time of the child's return to the parents the determination of the rite was not yet definitely final. Beyond the age at which the child can exercise its own free choice the desire of the parents could no longer influence the determination of the rite for the child. This argumentation is based on the theory—*per analogiam*—that a person who is able to decide his own rite, is also free to make the decision. This theory will be discussed in the following section.

There is a last question that calls for an answer. To what extent should a message which is attached to the foundling be taken into consideration, if it contains a request that the child be baptized a Catholic, but according to a particular rite?[81] We are inclined to think that the request should be honored, even if the infant be baptized privately. But here,

[78] Can. 98, § 3 and § 4.

[79] E. g. under a mental strain due to distress, etc., which could eliminate, or at least greatly reduce their accountability for their action.

[80] Cf. *infra*, p. 383 ff.

[81] E. g., it could read: "The parents are Russians and request that the child should follow the Byzantine-Slavonic rite."

too, the continuance of the child in the designated rite is contingent on the fact that no legal provision [82] will invalidate this decision when the ancestral relations have been clarified.

IV. Non-solemn Baptism of Adults

There is no doubt that an adult whose immediate ancestry is non-Catholic can freely decide in which rite he chooses to receive baptism.[83] This applies, of course, also to private baptism received in mortal danger. It is also certain that *adulti autem censentur, qui rationis usu fruuntur; idque satis est ut suo quisque animi motu baptismum petat et ad illum admittatur.*[84] This implies the actual use of reason, regardless of whether the person has or has not reached the *annus discretionis.*[85]

However, these principles do not solve all our problems. Are they applicable also to the case of unbaptized adults of Catholic parentage? And if they are, who is to be understood as an "adult" in this case? The giving of a proper answer to these question depends to a considerable degree upon whatever interpretation is attached to the term "*proles*". Canon 756, § 1, states: *Proles ritu parentum baptizari debet.* Does the term, in its strictest sense, point solely to a newly born infant, as it does in canon 742, § 3? Must it perhaps be interpreted in the sense in which canon 88, § 3, defines the word "*parochus*"? Or canon 88, § 2, the word "*minor*"? Or is the term "*proles*" to be understood as simply signifying a descendant, no matter what age he may have in life? The

[82] E. g., it is later found out that the Catholic parents are of another rite than that which had been designated as the one with which the child was to be affiliated.

[83] Dausend, *op. cit.* 91; Matthaeus Conte a Coronata, *Institutiones Iuris Canonici,* Vol. I (1928), 134, 141-143.

[84] Can. 745, § 2, 2°.

[85] Can. 1826; Waldron, *The Minister of Baptism,* 79, 80; James I. King, *The Administration of the Sacraments to Dying Non-Catholics,* The Catholic University of America Canon Law Studies, n. 23 (Washington, D. C.: The Catholic University of America, 1924), 11.

Code uses the term "*proles*" both in a broad as well as in a restricted sense.[86]

One depends on the right solution of this question if one is to find a basis for the final decision whether the obligation to be affiliated in baptism with the rite of the parents touches only the newly born infant, or only the *parvulus*, or also the minor, and even the person who has reached his majority.

A considerable number of authors favors a certain limitation in the interpretation of the term "*proles*". While their arguments are based on more or less detailed conclusions, there is agreement among them that an adult is free to decide his own rite in baptism.[87] It is pointed out that canon 745, § 2, 2°, establishes that *adulti autem censentur, qui rationis usu fruuntur.* It is further argued that if a person thus has the prerogative to ask for baptism, he has also an option in choosing the rite. In presenting this conclusion these authors restrict the term "*proles*" to make it apply exclusively to persons who have not yet acquired the use of reason (canon 745, § 2, 1°).

It is the merit of Dausend to have emphasized the fact that canon 745 speaks only of the prerogative to ask for baptism, and not of any prerogative to choose the rite of baptism. He also stresses the point that canon 745 simply deals with the various groups of persons qualified for the receiving of baptism, while canon 756 deals exclusively with the question of the rite in which the *proles* is to become affiliated.[88]

[86] Köstler, *Wörterbuch zum Codex Iuris Canonici*, s. v. "*proles*"; Dausend, *op. cit.*, 84.

[87] Cappello, *Summa Iuris Canonici*, I, 192; Gommarus Michiels, *Principia generalia de personis in Ecclesia. Commentarius libri secundi C.J.C.* (1932) 299-304; Albertus Blat, *Commentarium textus iuris canonici*, (5 vols. in 6), (1920-1927), Vol. III, Pars. I, 48, in can. 756; Alexius Petrani, *De relatione iuridica inter diversos ritus in ecclesia catholica* (1930), 64. The last mentioned author simply offers the short statement that "*adulti hodie generatim liberi esse videntur sequi ritum quem velint, in hoc tamen ritu ordinarie baptismus ab eis suscipiendus est.*"

[88] *Op. cit.*, 85.

However, while we agree with Dausend's conclusion that the choice of rite is not left to the discretion of the *proles*, we are not convinced by his further argument that the reason for which children must be baptized in the rite of their parents is that the ordinary minister of baptism is a priest, and normally the pastor according to the prescriptions of canons 462, 1°, and 738, § 1.[89]

In our opinion there is first of all no logical connection between Canon 745 and Canon 756. The two canons deal with different problems. The one with the reception of baptism, and the other with the rite in which it is to be conferred. The listing and classification, in canon 745, of the potential recipients of baptism has nothing in common with the specification, in canon 756, of the various possible phases and degrees of interrelation between the *proles* and the *parentes*. This is a consideration which is to be kept in mind with due appreciation of the fact that a distinction of concepts is involved.

A second point which must be acknowledged is the following. To narrow the concept of the term *proles* in such a manner that it comprises only such persons as have not yet reached the use of reason seems unwarranted in the light of the varied use of this term in other parts of the Code.[90] One finds the same varied use in Roman Law,[91] and in the Classical Latin,[92] as Dausend has pointed out.[93]

In addition, canon 742, § 3, employs the term "*proles*" when it states that parents are not permitted to baptize their offspring, except in the case of mortal danger and when no one

[89] *Ibid.*, 85, 86.

[90] Köstler, *op. cit.*, 285, renders the primary meaning as *Nachkommenschaft* (descendants), and the secondary meaning as *Kinder* (children).

It is of interest to note here that Mörsdorf (*op. cit.*, 114 ff.) in his otherwise rather searching discussion of the terminology of "person" and "personal status," passes over in complete silence the consideration of the term "*proles*."

[91] J. Heumann-E. Seckel, *Handlexikon zu den Quellen des römischen Rechts*, 2. ed. (1926), 468, s. v. "*proles*."

[92] Cicero, *De legibus* 3, 7; Vergil, *Aeneid* 10, 429.

[93] *Op. cit.*, 84.

else is present to administer the sacrament. Now while it is admitted that most frequently it will be a newly born infant who in danger of death needs to receive baptism from one of the parents, yet it is clear from the history of the *cognatio spiritualis* that the restriction placed on parents in conferring baptism on their children existed not merely with reference to the children who were *parvuli,* but in relation to all the children in any circumstance whatsoever.[94]

We consequently hold that the term *"proles"*, as used in canon 756, signifies any and every natural descendant, regardless of age, from the age of infancy through the age of majority. The reason for this rule is not to be sought, as Dausend holds, in the prescription of the Code concerning the one who is entitled to confer solemn baptism. The prescription follows simply as a corollary from the authorization in law which the parents' pastor enjoys in a given case. He could never claim and vindicate this special authorization in the case of a person who has reached the age of majority and who has a domicile or quasi-domicile other than the parents, or whose parents are no longer alive, yet it is the constant tendency of the Church to preserve for the children, whenever possible, the particular Catholic rite of their parents.[95]

This same tendency of the Church applies also in the cases wherein the Catholic parents have broken away from the Church, and, thereupon have neglected to have their descendants baptized, for the parents themselves have not ceased to be baptized parents, nor have they forfeited affiliation with a particular rite of the Church. The descendants of such perents, no matter at what age they may later enter the Church, will follow the rite of their parents. The same rule holds true

[94] W. Plöchl, *Das Ehercht des Magisters Gratianus,* Wiener Staats- und Rechtswissenschaftliche Studien, Vol. XXIV (1935), 80 ff.

[95] Dausend, *op. cit.,* 139 ff.; Petrani, *op. cit.,* 25 ff. Stephen C. Gulovich, "Matrimonial Laws of the Catholic Eastern Churches"—THE JURIST, IV (1944), 203 ff.; W. Plöchl, "The Church Laws for Orientals of the Austrian Monarchy in the Age of Enlightenment."—*Bulletin of the Polish Institute of Arts and Sciences in America,* II (1943-1944), 711 ff.

also for the case of private baptism of such persons: *Proles ritu parentum baptizari debet.*

However, in all cases in which the *baptizandus* is not of Catholic parentage, the preference of rite as expressed by the candidate receives primary consideration when baptism is administered either solemnly or privately to one who is capable of exercising his own personal discretion. If the candidate is able to express himself sufficiently, the decision as made remains without any complication. If the person thus baptized survives, his previously expressed preference should be made known before the ceremonies will eventually be supplied.

In case the expression of preference on the part of the *baptizandus* remains in doubt, and his death occurs before any clarification of his intention has been obtained, it will suffice in most of the cases to determine the (legal) rite of the deceased on the basis of the evidence available, and on the grounds of the principles stated above.[96] The condition of background, the testimony of witnesses, the notice contained in a document, etc., in fact any kind of evidence which could shed some light on the intention of the deceased is open to further exploration and clearer inspection. It may become necessary to seek such evidence, especially when there is need of determining, even after the death of the person, to which rite he belonged, e. g., when the proper determination of a posthumously born child's affiliation with a particular rite postulates such information and knowledge.[97]

V. Adults According to Canon 759, § 2.

The last question in our discussion concerns the private and conditional baptism of adult heretics outside of mortal danger. As Goodwine says,[98] in granting the permission to dispense with the ceremonies of solemn baptism, the ordinary has also

[96] Cf. *supra*, p. 373.

[97] A similar need could arise in connection with the execution of a bequest or an inheritance, inasmuch as the person's *proper* parish is designated as the beneficiary.

[98] Goodwine, *op. cit.*, 103.

the power to prescribe certain ceremonies which must be observed. Undoubtedly it also pertains to the *baptizandus* in this case to specify the rite in which he is to be received in the Church.

It is of course preferable that the minister of such a private and conditional baptism belonged to the rite into which the convert wishes to be received. This is suggested *per analogiam* with the rule enacted in canon 98, §1. However, the minister's identity of rite with the rite which the prospective recipient has chosen as his own rite is not a matter of essential requirement. Particularly in all those cases in which the ordinary has under his jurisdiction also the faithful of that rite which the convert intends to join, it remains with the discretion of the bishop to make the necessary decision concerning the person of the minister of baptism.

In cases in which the convert desires to join a rite whose faithful are under the jurisdiction of their own local ordinary, the competent bishop should be notified of the convert's intention, in order that it may be made possible for him to be received into the Church according to the ceremonies of the rite to which he wishes to belong. If this cannot be done, then in view of a pressing necessity a private and conditional baptism could be administered by the minister of another rite, provided that he has permission to do so from his own ordinary.[99] This minister will then inform the convert's proper pastor regarding the administration of the conditional baptism. This procedure seems suggested in consideration of the analogy of the present case with the case for which the law demands, in canon 778, the sending of such notification.

WILLIBALD M. PLÖCHL
THE CATHOLIC UNIVERSITY OF AMERICA

[99] The other ordinary, under whose jurisdiction the convert will come after baptism, has no jurisdiction over the minister who is not his subject.

THE MARRIAGES OF UNWORTHY CATHOLICS: CANONS 1065 AND 1066 *

IN the observance of the canonical rules of prenuptial investigation which are set forth in canon 1020 of *The Code of Canon Law,* and which are developed in greater detail in the Instruction which was issued by the Sacred Congregation of the Sacraments on June 29, 1941,[1] not infrequently there will be brought to the attention of the investigating pastor or parochial assistant prospective marriages in which one or both of the contracting parties are notoriously or publicly unworthy Catholics. If both parties have been baptized in the Catholic Church, and if neither of them has joined a sect which is either heretical or schismatic, obviously they are not prevented from contracting marriage by the impediment of mixed religion. Consequently, such marriages are not to be regulated by the prescriptions of law for mixed marriages as set forth in canons 1060-1064.

The marriages of the faithful with such unworthy Catholics are considered as a distinct type in canon law and are to be regulated in accordance with the prescriptions of canons 1065 and 1066. This law of the Code is emphasized in the Questionnaire which was prepared in connection with the previously mentioned Instruction of the Sacred Congregation of

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[1] S. C. de Sacr., instr., *De normis a parocho servandis in peragendis canonicis investigationibus antequam nupturientes ad matrimonium incundum admittat* (*Can. 1020*), 29 iun. 1941—*Acta Apostolicae Sedis, Commentarium Officiale* (Romae, 1909—), XXXIII (1941), 297 (hereinafter cited as *AAS*); THE JURIST (Washington, D. C., 1941—), II (1942), No. I (January), *Supplement; The Ecclesiastical Review* (Philadelphia, Pa., 1889—), CV (1941), *Supplement* (hereafter cited as *ER*).

the Sacraments for the prenuptial examination of the parties. The investigating priest is directed to inquire prudently whether either spouse has notoriously given up the Catholic faith (even though he has not joined a non-Catholic sect); whether he has joined societies which have been condemned by the Church (canon 1065); whether he belongs or has belonged to an atheistic sect. Moreover, from another source the priest is to inquire whether the person is a public sinner or whether he is notoriously bound by censure (canon 1066). The priest is to endeavor to learn these things from the bridegroom concerning the bride and *vice versa*. If the reply is in the affirmative, the priest must act in accordance with the prescriptions of canons 1065 and 1066.[2]

I. Notoriously or Publicly Unworthy Catholics

According to canon 1065, the faithful are to be deterred from contracting marriage with those Catholics who are guilty either of notorious defection from the faith, without joining a non-Catholic sect, or of notorious membership in societies which have been condemned by the Church. Canon 1066 does not contain so explicit a warning that the faithful are to be deterred from contracting marriage with Catholics who are either public sinners or notoriously under the censure either of excommunication or of personal interdict. Nevertheless, such a warning is contained implicitly in the canon. As in canon 1065, § 2,[3] so, too, in canon 1066[4] there is a conditional prohibition against the assistance of the pastor at such marriages.

The element of notoriety is predicated of six of the seven classes of unworthy Catholics who are specified in canons 1065 and 1066. Those who are mentioned in these six groups therefore may be classed as *notoriously* unworthy Catholics.

[2] S. C. de Sacr., instr., 20 iun. 1941, Allegatum I, n. 8—*AAS*, XXXIII (1941), 309.

[3] "Parochus praedictis nuptiis ne assistat, nisi . . . ."

[4] ". . . parochus eius matrimonio ne assistat, nisi . . . ."

Canon 1065 comprises those Catholics who are notoriously guilty of crimes or delicts against the faith (apostates and heretics who have not joined a non-Catholic sect, i. e., lapsed Catholics) or against the unity of the Church (schismatics who have not joined a schismatic sect), and those who offend against ecclesiastical authority (members of condemned societies). Canon 1066 includes those who are notoriously excommunicated or interdicted.

The seventh class of unworthy Catholics is composed of those who are known in law as *public sinners*. This group is included in canon 1066 and should be classified as *publicly* (not necessarily notoriously) unworthy Catholics.

1. THE NOTION OF NOTORIETY

A delict may be notorious by notoriety of law or by notoriety of fact. It is *legally* notorious after a judicial sentence which has been rendered by a competent judge in a trial,[5] in a matter which has become adjudged (*res iudicata*) in any of the three ways outlined in canon 1902, or after the delict has been confessed in a criminal[6] trial, either orally or in writing, whether spontaneously or in answer to a legitimate question by the judge.[7] It is *factually* notorious when it is publicly known and, at the same time, was committed in such circumstances that it cannot be concealed by means of any subterfuge or excused by means of any legal aid or defense.[8]

Canonists are not in agreement concerning the inclusion of the idea of publicity or divulgation as a prerequisite quality in the notion of notoriety. The majority of canonists maintains that notoriety necessarily includes the publicity which is found in the notion of a public delict.[9] They contend, therefore, that a notorious delict is one which is already widely

[5] Canon 1552, § 2, 2°.

[6] Canon 1552, § 2, 2°.

[7] Canon 2197, 2°; canon 1750.

[8] Canon 2197, 3°.

[9] Canon 2197, 1°.

publicized and known, or almost certainly bound to become so, to which is then added the element of notoriety, that is, the fact of the delict being either legally notorious or factually unconcealable and inexcusable.[10]

Canonists agree in general that notoriety is that element which is predicated of a delict when it appears fully culpable, when it is evident that it was the intention of the delinquent freely to commit an act which he knew was contrary to the law.[11] Therefore, a person who commits a notorious delict is one who is popularly believed to have realized that he was acting contrary to the law and to have chosen freely to do so. It is precisely this element of inexcusability, arising from the delinquent's apparent knowledge of the criminal character of his deed, which differentiates a *notorious* crime or delict from a *public* delict.

The determination of the existence of notoriety in relation to a particular delict no longer depends upon the fact that the delict was committed in the presence of a major part of the community or upon the duration of time that it has existed.

[10] Sole, *De Delictis et Poenis* (Romae: Pustet, 1920), p. 11; Vermeersch-Creusen, *Epitome Iuris Canonici* (3 vols., Vol. I, 6. ed., 1937, Vols. II et III, 5. ed., 1934-1936, Mechliniae-Romae: H. Dessain), III, n. 384; Blat, *Commentarium Textus Codicis Iuris Canonici* (5 vols. in 7, Romae: Collegio "Angelico." 1921-1938), V, n. 8; Wernz-Vidal, *Ius Canonicum* (7 vols. in 9, Romae: Apud Aedes Universitatis Gregorianae, 1927-1938), VII, n. 35; Cocchi, *Commentarium in Codicem Iuris Canonici* (8 vols., Taurinorum Augustae: Marietti, 1931-1940), VIII (4. ed., 1938), n. 1; Chelodi, *Ius Poenale et Ordo Procedendi in Iudiciis Criminalibus iuxta Codicem Iuris Canonici* (4. ed., recognita et aucta a V. Dalpiaz, Tridenti: Libreria Moderna Editrice A. Ardesi, 1935), n. 4 et nota 4; Roberti, *De Delictis et Poenis* (2. ed., Romae: Pontificium Institutum Utriusque Iuris, 1938), n. 44; Cerato, *Censurae Vigentes Ipso Facto a Codice Iuris Canonici Excerptae, Commentarium* (2. ed., Patavii, 1921), n. 2; Vlaming, *Praelectiones Iuris Matrimonii* (3. ed., 2 vols., Bussum in Hollandia, 1919-1921), I, n. 246; Kerin, *The Privation of Christian Burial*, The Catholic University of America Canon Law Studies, n. 136 (Washington, D. C.: The Catholic University of America Press, 1941), p. 135.

[11] Vermeersch-Creusen, *Epitome*, III, n. 384; Coronata, *Institutiones Iuris Canonici* (5 vols., Taurini [Italia]: Marietti, 1928-1936), IV, n. 1645, p. 15 Roberti, *De Delictis et Poenis*, n. 44; Cocchi, *Commentarium in Codicem Iuris Canonici*, VIII, n. 1; Chelodi, *Ius Poenale*, n. 4.

According to the law of the Code it is very appropriately left to the judge who must decide the case to estimate the notoriety which may be present.[12]

2. CATHOLICS GUILTY OF CERTAIN NOTORIOUS DELICTS

a. *Apostates, Heretics, Schismatics—Not Enrolled in a Non-Catholic Sect*

Before a detailed study may be made of the three groups which are included in canon 1065 as guilty of notorious defection from the faith, by apostasy, heresy or schism, it will be necessary to consider the meaning of the clause: "*etsi ad sectam acatholicam non transierint,*" which is applied to them in that canon.

The conjunction "*etsi*" is to be translated here as "*although,*" followed by the verb "*transierint*" in the indicative mood to form a restrictive clause which states an established fact, that is, that the one who is guilty of the notorious defection from the faith has not joined "a non-Catholic sect." The meaning of this part of the canon is that the faithful should be deterred *also* from contracting marriage with persons who have notoriously fallen away from the faith *but have not joined a non-Catholic sect.*

This interpretation of the "*etsi*" clause seems justified for several reasons. In the immediately preceding canon the legislator has decreed that Ordinaries and other pastors of souls should deter the faithful from contracting mixed marriages.[13] A mixed marriage is described as a marriage between two baptized persons, one of whom is a Catholic, while the other is enrolled in an heretical or a schismatic sect.[14] The legislator indicates that he is repeating the same warning in canon 1065 when he employs the word "*quoque.*" He decrees that the faithful are to be deterred "*also*" or "*in the same manner*" from contracting marriage with persons who have been guilty

12 Roberti, *De Delictis et Poenis,* n. 44. Cf. also canons 2293, § 3; 2295.

13 Canon 1064.

14 Canon 1060.

either of notorious defection from the faith by apostasy, heresy or schism, or of notorious membership in a condemned society. The expression "*quoque*" thus distinguishes those who are referred to in canons 1060-1064 from the groups which are contemplated in canon 1065.

Moreover, if the "*etsi*" clause were to be understood to mean "*whether or not* these delinquents have joined a non-Catholic sect," no purpose would be served by including for a repeated warning in canon 1065 those fallen-away Catholics who have actually enrolled in a non-Catholic sect. Such a contingency had already been provided for in canons 1060-1064. Consequently, the "*etsi*" clause in canon 1065, § 1, must be understood to express the established fact that these delinquents have not joined a non-Catholic sect. Thus, canon 1065 does not refer to these delinquents if they have actually enrolled in a non-Catholic sect. In cases of this latter type the impediment of mixed religion exists and a dispensation must be obtained before the marriage may be permitted.

This interpretation of the "*etsi*" clause reflects the pre-Code legislation which was contained in several decrees issued by the Supreme Sacred Congregation of the Holy Office. The first such decree was issued on January 30, 1867, in response to several questions which had been proposed by the Bishop of Liége, Belgium. The Holy Office declared that, whenever a marriage was to be contracted by a Catholic with a baptized Catholic who had fallen away from the faith and *had become a member of a false religion or sect*, it was required that the usual and necessary *dispensation from the impediment of mixed religion* be obtained.[15]

This provision of the decree was repeated exactly in an Instruction which was sent by the Supreme Sacred Congregation of the Holy Office to the twelve Ordinaries of Brazil on July

[15] *Codicis Iuris Canonici Fontes cura Emi. Petri Gasparri editi* (9 vols., Romae [postea Civitate Vaticana]: Typis Polyglottis Vaticanis, 1923-1939 [Vols. VII, VIII, et IX ed. cura et studio Emi. Iustiniani Card. Serédi], n. 998 (hereafter cited as *Fontes*).

2, 1878.[16] However, when the marriage was to be contracted between a Catholic and one who had rejected the Catholic faith but *had not become a member of any false religion or sect*, and if the marriage could not be prevented, the Bishop was given the faculty to grant permission for the pastor to assist at the marriage passively under certain conditions.[17]

This proposed interpretation of the "*etsi*" clause in canon 1065, § 1, is also accepted by the canonists who consider the matter. Thus, Cappello states clearly that, if in such marriage cases the Catholic who is guilty of defection from the faith has gone over to a non-Catholic sect, the impediment of mixed religion is present.[18] The marriage of a faithful Catholic with such a delinquent will not be regulated by canon 1065, but by canons 1060-1064. Conversely, if such a fallen-away Catholic does not join an heretical or a schismatic sect the *canonical* impediment of mixed religion does not exist. These two points are agreed upon unanimously by the canonists and the moralists.[19]

[16] *Fontes,* n. 1056.

[17] *Fontes,* n. 998. Cf. also S. C. S. Off., 25 maii 1897—*Fontes,* n. 1186; 11 ian. 1899—*Fontes,* n. 1215.

[18] *Tractatus Canonico-Moralis de Sacramentis* (3 vols. in 6, Romae: Marietti, 1932-1939), III (*De Matrimonio,* 4. ed., 1939), n. 330 (hereinafter cited as *De Sacramentis*).

[19] Wernz-Vidal, *Ius Canonicum,* V, nn. 168 (nota 1), 173, 201; Farrugia, *De Matrimonio et Causis Matrimonialibus Tractatus Canonico-Moralis Iuxta Codicem Iuris Canonici* (Taurini-Romae: Marietti, 1924), nn. 131 (in nota), 139; Vermeersch-Creusen, *Epitome,* II, n. 330; Vlaming, *Praelectiones Iuris Matrimonii,* I, n. 244; Gougnard, *Tractatus de Matrimonio* (7. ed., Mechliniae: H. Dessain, 1931), pp. 132, 356; Chelodi, *Ius Matrimoniale Iuxta Codicem Iuris Canonici* (3. ed., Tridenti: Libr. Edit. Tridentum, 1921), n. 58; Schenk, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult,* The Catholic University of America Canon Law Studies, n. 51 (Washington, D. C.: The Catholic University of America, 1929), pp. 88, 92; Blat, *Commentarium Textus Codicis Iuris Canonici,* III, Pars I, n. 455; Ayrinhac-Lydon, *Marriage Legislation in the New Code of Canon Law* (2. ed., New York: Benziger Brothers, 1936), n. 115; Woywod, *A Practical Commentary on the Code of Canon Law* (5. ed., 2 vols., New York: Joseph F. Wagner, Inc., 1939), I, 614; Aertnys-Damen, *Theologia Moralis secundum Doctrinam S. Alfonsi de Ligorio* (11. ed., 2 vols., Taurinorum Augustae: Marietti, 1928), II, n. 707; Cerato, *Matrimonium a Codice Iuris Canonici Integre Desumptum* (4. ed., Patavii, 1929), nn. 54, 59.

With regard to a method for determining when or how a person is considered to have joined or to have gone over to a non-Catholic sect, the Code specifies two ways of committing this delict.[20] This *aggravated* form of the delict of heresy is committed either by *formal inscription* as a member of a non-Catholic sect or by the *practical membership* which consists in publicly adhering to it. The first type of membership would be a matter of record, and hence not too difficult to prove juridically. It would be found in those sects which provide a formal process of admission and which keep a record of the names of those who have been so admitted. The second type of membership is found in many other sects which do not observe a formal enrollment of members, but in which membership consists merely in attendance and in co-operation in religious practices.[21]

The three groups to be considered now are those who, despite their initiation into the Church by baptism, later have seceded from communion with her but have not joined any non-Catholic sect.

An apostate is officially defined by the Code as a person, who, after having received baptism, has completely abandoned the Christian faith.[22] For the commission of the delict of apostasy it is not sufficient that there be a denial of one or the other dogma. That constitutes not apostasy but heresy. Apostates reject Christianity in its entirety and profess to be Jews, Mohammedans, pagans, atheists, deists, pantheists, rationalists, modernists in religion, materialists, indifferentists, "free-thinkers," naturalists, or complete unbelievers. Here a distinction must be made between abandonment of religious *belief* and abandonment of religious *practices*. A Catholic may become indifferent and no longer practice his religion,

[20] Canon 2314, § 1, 3 °.

[21] MacKenzie, *The Delict of Heresy in Its Commission, Penalization, Absolution*, The Catholic University of America Canon Law Studies, n. 77 (Washington, D. C.: The Catholic University of America, 1932), pp. 41, 51, 53.

[22] Canon 1325, § 2.

and yet never have rejected and eliminated *belief* in revelation and in the Church. In this case there is no apostasy in the canonical sense of the term. However, such a Catholic will be included in the group referred to in canon 1066 as *public sinners*. The act of apostasy or abandonment of the faith must be externally manifest—a condition necessary for the commission of a delict.[23]

The heretics who are to be considered as coming within the scope of canon 1065 are those Catholics who are notoriously guilty of heresy but have not joined any non-Catholic sect. The Code states that if anyone, after having received baptism and while retaining the name Christian, pertinaciously denies or doubts some of the truths that must be believed as pertaining to divine and Catholic faith, he is a heretic.[24] This definition, through its use of the word *pertinaciously,* indicates a *formal* heretic—which presupposes knowledge of the wrongdoing on the part of the heretic.

As MacKenzie explains, the essence of heresy is that it is a deliberate and presumptuous rebellion against the authority of God and the Church in the matter of religious belief and profession.[25] The two delicts of apostasy and heresy differ only in degree. Apostasy is a total defection from the faith; heresy is a partial defection. Heretics reject some, but not all, revealed truths of divine and Catholic faith.

As long as the sinner is actually ignorant of the fact that he is denying or doubting a *revealed* truth, his sin is technically not a formal sin of heresy. If his ignorance is culpable —regardless of whether it is to be characterized as a simple, as a crass or supine, or even as an affected ignorance—his sin is directly opposed not to the virtue of faith but to the command to learn the revealed truths of religion and to order his life in proper relation to God and to the divinely established

[23] Canon 2195, § 1.

[24] Canon 1325, § 2.

[25] *The Delict of Heresy,* p. 40.

economy of salvation.[26] Such a person is in need of further instruction in Christian Doctrine. Hence, serious efforts should be made by the pastor to impart this instruction before such a person contracts marriage.[27]

If the heretic not only thinks formally sinful heretical thoughts but openly professes them, he thereby externalizes his error and is guilty of the delict of heresy. That a delict be verified there must be an external act, the malice of which derives from the subjective sin but the effect of which is a disturbance of the life of the Church as a social body. If the guilt of the heretic is publicly known by the community as unconcealable and inexcusable, his delict is *notorious*.

A schismatic is officially defined by the Code as one who, after having received baptism, refuses to remain subject to the Supreme Pontiff or to communicate with the members of the Church who are subject to the Supreme Pontiff.[28] This definition refers to formal schismatics, and, strictly, only to those who are guilty of *pure* schism.

Schism of this type is now not very common. Practically, as well as historically, schism tends to become *mixed* schism, that is, pure schism mixed with heresy. This is particularly verified in the case of various Oriental sects and the so-called "Old Catholics" who are commonly designated as schismatic despite the heretical tenets which they are known to profess.[29] In these days it is difficult to profess belief in the dogmas of the primacy and the infallibility of the Pope and still remain separated from him or from his subjects precisely because they are his subjects.

The schismatics who are to be considered as coming within the scope of canon 1065 are those Catholics who are notoriously guilty of schism but have not joined any non-Catholic

[26] Sole, *De Delictis*, p. 223; Chelodi, *Ius Poenale*, n. 57; MacKenzie, *op. cit.*, p. 32.

[27] Canon 1020, § 2.

[28] Canon 1325, § 2.

[29] MacKenzie, *The Delict of Heresy*, p. 17.

sect. It is necessarily presupposed, then, that one can be a schismatic without joining a schismatic sect.[30]

Schism is punished with the same penalties as apostasy and heresy. The most serious of these is the excommunication which is incurred *ipso facto* by one guilty of the delict of schism. It is to be noted that the prescriptions of canon 1065 do not apply strictly to a Catholic who is guilty simply of apostasy, heresy or schism. He must be a *notorious* delinquent, one whose delict is publicly known by the community as unconcealable and inexcusable, or has been condemned by a judicial sentence. If there is any doubt about the presence of apostasy, heresy or schism strictly so-called, or about the notoriety of such a delict in a particular instance, such a case will not come within the scope of canon 1065. However, if a non-notorious delict of apostasy, heresy or schism has been committed the delinquent will be included among those who are referred to in canon 1066, either as a *notoriously excommunicated person,* if the censure itself is *factually* notorious (even though the delict remains occult), or as a *public sinner,* if the delict was public.

b. *Catholics Notoriously Enrolled in Condemned Societies*

The Code declares in canon 1065, § 1, that the faithful are also to be deterred from contracting marriage with notorious members of condemned societies.

Membership in the Masons or in any other condemned society may be established in many ways. The Supreme Sacred Congregation of the Holy Office decreed that a person cannot be considered as an *occult* Mason if he frequents Masonic meetings, if he wears their emblems and insignia publicly and, in general, if he shows that he is a member of Masonry.[31] Accordingly, there need be no exact determination of how one became associated with a particular condemned society. The

[30] Cf. canon 2314, § 1, 1 °, 2 °.

[31] S. C. S. Off., 27 iun. 1838—*Collectanea S. Congregationis de Propaganda Fide* (2 vols., Romae, 1907), I, n. 868 (hereafter cited as *Coll. S. C. P. F.*)

public appearance of membership in the society is the important element in the present consideration of the application of the prescriptions of canon 1065.

As Quigley rightly observes, canon 1065 refers to all those who are actually members ("*adscripti sunt*") of a condemned society.[32] Unlike canon 2335, it does not contain the phrase "*nomen dantes,*" which could conceivably restrict the application of the prescriptions of the canon to those who join the condemned society in bad faith. Consequently, one who joins a condemned society in good faith and later, having learned of the condemnation, refuses to withdraw from the society comes within the scope of canon 1065, if his membership is notorious.

Condemned societies are those in which the Church forbids her subjects to take membership, or which she declares unlawful under penalty either of censure or of grave sin without censure.[33] Both types of societies which are condemned by the Church come within the scope of canon 1065, as the canon makes no distinction.

The societies which are condemned in canon 2335 under penalty of the censure of excommunication, incurred *ipso facto* and reserved *simpliciter* to the Holy See, are those which are known as Anti-Social Societies. Those Anti-Social Societies which are known to have been condemned by the Church under censure, explicitly and *nominatim,* are the Freemasons, the Carbonari and the Fenians. The latter two societies no longer exist. Other societies which are included in the condemnation in canon 2335 as being similar to Freemasonry in conspiring against the Church or the State are: The Societies of the Nihilists, the Anarchists, the Extreme Socialists, the Communists, the Bolsheviks, the Clerico-Liberalists, and those societies which are affiliated with Freemasonry, such as the

[32] *Condemned Societies,* The Catholic University of America Canon Law Studies, n. 46 (Washington, D. C.: The Catholic University of America, 1927), p. 103.

[33] Quigley, *op. cit.,* p. 7. Cf. canons 684 and 2335.

Order of the Knights Templar, the Order of DeMolay, the Masonic Cremation Societies, and the female societies affiliated with Freemasonry (e. g., the Order of the Eastern Star), or with other similar societies.[34]

The societies which are condemned by the Church under penalty of grave sin without censure are: the Secret Societies (among which are to be classed the Order of Odd Fellows, the Independent Order of Good Templars, the Order of the Knights of Pythias, and the Order of the Sons of Temperance), the Non-Catholic Bible Societies, the Cremation Societies and the Theosophical Societies.[35] Cappello includes, also, the Young Men's Christian Association (Y.M.C.A.) as a condemned society.[36] Wernz-Vidal hold the same opinion and include, likewise, the Young Women's Christian Association (Y. W. C. A.).[37] Quigley maintains that the Y. M. C. A. does not appear to have been condemned.[38]

It should be borne in mind that the prescriptions of canon 1065 apply to membership in any condemned society, whether it be Masonic or non-Masonic, whether it be condemned under penalty of censure or simply under pain of grave sin without censure. Moreover, the provisions of the canon apply only in the case of *notorious* members of condemned societies. Because of the requirement of notoriety, any doubt as to whether the person concerned is known to belong to a condemned society and to realize that he is thus affiliated contrary to the law of the Church will render his affiliation non-notorious and will exclude him from the provisions of canon 1065. If his

[34] Cappello, *De Sacramentis,* III, n. 330; Cappello, *Tractatus Canonico-Moralis de Censuris iuxta Codicem Iuris Canonici* (3. ed., Augustae Taurinorum et Romae: Marietti, 1933), n. 298 (hereinafter cited as *De Censuris*); Quigley, *op. cit., pp.* 66-68, 101-102; Coronata, *Institutiones Iuris Canonici,* n. 679, IV, nn. 1951-1952; Wernz-Vidal, *Ius Canonicum,* VII, n. 448.

[35] Cappello, *loc. cit.;* Coronata, *loc. cit.;* Wernz-Vidal, *loc. cit.* Cf. canon 684.

[36] *De Sacramentis,* III, n. 330.

[37] *Ius Canonicum,* VII, n. 448.

[38] *Condemned Societies,* pp. 69, 102.

membership is publicly known, but not to the point of notoriety, he comes within the scope of canon 1066 as a *public sinner,* since membership in any of the condemned societies is forbidden at least under the penalty of grave sin. If an excommunication has been enacted by particular law against membership in these condemned societies, the commentary on the notoriously excommunicated is also applicable in such instances, as it is in the cases of membership in any of the Anti-Social Societies. If the delict of membership is public and the censure of excommunication is notorious, the delict will thereby become notorious and will subject the delinquent to the prescriptions of canon 1065. If the delict remains occult, while the censure is *factually* notorious, the delinquent will be subject to the prescriptions of canon 1066.

c. *Notoriously Excommunicated or Interdicted Catholics*

Canon 1066 designates notoriously censured Catholics as notoriously unworthy to contract marriage with a faithful Catholic. A censure is a penalty by which a baptized person, who is contumaciously guilty of a canonical delict, is deprived of some spiritual goods or of goods annexed to spiritual things, until he ceases to be contumacious and is absolved.[39] There are three kinds of censures: excommunication, suspension and interdict.[40]

The notoriously censured Catholics who are declared in canon 1066 to be notoriously unworthy for marriage with a faithful Catholic are those who are under the censure of excommunication or of personal interdict. Since the censure of suspension affects only clerics,[41] it can have no practical application in the matter of worthiness for the contracting of marriage.[42] Therefore, for the purposes of determining notorious

[39] Canon 2241, § 1. The canonical delicts on account of which censures may be incurred will be found in Book Five, Part III, canons 2314-2414 of the Code.

[40] Canon 2255, § 1.

[41] Canon 2278, § 1.

[42] Cf. canon 1072.

unworthiness of a Catholic for marriage with a faithful Catholic and for the application of the provisions of canon 1066, a notoriously censured person is one who is excommunicated or who is under personal interdict, when that censure is so public that it is unconcealable and inexcusable, or has been imposed by a judicial sentence.[43]

It should be noted that the legislator refers here only to *notoriously* censured persons. If the fact that a person is under the ban of excommunication or of personal interdict is known only through sacramental confession, it cannot be taken into consideration in the external forum. Further, if the fact that a person is under censure is known outside sacramental confession but remains occult, the pastor is obliged to warn such a person privately of the obligation of becoming reconciled with the Church, unless the pastor in his prudence judges that it is more expedient to abstain from this admonition. However, the pastor cannot refuse to assist at the marriage of such a person.[44] Even though the censure is not notorious, the delinquent may, nevertheless, be subject to the prescriptions of canon 1066, not as a notoriously censured person but as a public sinner.

Excommunication is a censure by which a person is excluded from the communion of the faithful together with the effects which, as enumerated in canons 2259-2267, are not subject to dissociation and, consequently, are inseparable.[45]

Interdict is a censure by which the faithful, while remaining in communion with the Church, are forbidden the use of certain sacred things which are enumerated in canons 2270-2277.[46] An *interdict* is *local* when it directly affects a place in which

[43] Canon 2197, 2 °, 3 °.

[44] Wernz-Vidal, *Ius Canonicum,* V, n. 202; Cappello, *De Sacramentis,* I, n. 74, III, n. 332; Ayrinhac-Lydon, *Marriage Legislation,* n. 116; Hyland, *Excommunication, Its Nature, Historical Development and Effects,* The Catholic University of America Canon Law Studies, n. 49 (Washington, D. C.: The Catholic University of America, 1928), p. 101.

[45] Canon 2257, § 1.

[46] Canon 2268, § 1.

the use of certain things is forbidden. Only indirectly does it affect all persons while they are living in the interdicted place. A *personal* interdict is one which directly affects the person and follows him wherever he goes.[47] Only when a Catholic is under notorious *personal* interdict is he brought within the scope of canon 1066 as notoriously unworthy for marriage with a faithful Catholic.

The essential difference between excommunication and interdict is found in the fact that an interdict does not separate the delinquent from the communion of the Church.[48]

As regards the other effects which result from these two censures, they are alike in this that each censure deprives the delinquent of both the reception and the active confecting or administration of the Sacraments and the sacramentals.[49]

Since Matrimony is one of the seven Sacraments, a Catholic who is under the ban of excommunication or of personal interdict is forbidden to receive it.[50] If such a Catholic, despite this prohibitive law, receives the Sacrament of Matrimony, he is guilty of grave sin.[51]

The doctrine is now theologically certain that the contracting parties themselves are the ministers of the Sacrament of Matrimony.[52] Hence, there is a double prohibition against a Catholic who is excommunicated or personally interdicted to contract marriage. Such persons are forbidden both to administer and to receive the Sacraments. It is certain that the contracting parties, in so far as they are the *recipients* of the

[47] Canons 2268, § 2; 2269, § 2.

[48] Hyland, *Excommunication,* p. 4; Conran, *The Interdict,* The Catholic University of America Canon Law Studies, n. 56 (Washington, D. C.: The Catholic University of America, 1930), p. 6.

[49] Canons 2260, § 1; 2261, § 1; 2275, 2°

[50] Canons 2260, § 1; 2275, 2 °.

[51] Hyland, *Excommunication,* p. 99; Conran, *The Interdict,* p. 112.

[52] Noldin-Schmitt, *Summa Theologiae Moralis* (3 vols., Oeniponte: Typis et Sumptibus Fel. Rauch, 1938-1940), II (26. ed., 1940), n, 509; Aertnys-Damen, *Theologia Moralis,* II, n. 626; Cappello, *De Sacramentis,* III, n. 32.

Sacrament, are bound *sub gravi* to be in the state of grace, since it is a Sacrament of the Living. It is probable that, in so far as they are the *ministers* of the Sacrament, the obligation to be in the state of grace binds only *sub levi*. This opinion is based on the fact that the contracting parties were not *ordained* and are not ministers *ex officio* for the administration of the Sacrament of Matrimony.[53] In the administration of the other Sacraments the minister, who is a priest, acts as a public person who is obliged by virtue of his office to attend to the merits and demerits of the recipients lest he become an unfaithful dispenser. In the administration of the Sacrament of Matrimony the minister is a private person who is entering into the contract of marriage and, hence, he attends only to his own utility. However, it seems to be a grave sin to contract marriage with an excommunicate who is a *vitandus*.[54]

Canon 1066 refers only to notoriously censured Catholics. It is possible for a censure, as such, to be *factually notorious* even though the delict committed was not notorious. Thus, a factually notorious censure is a *censure* which is so publicly known as to be unconcealable and inexcusable, whether the delict was notorious, public or even only occult. A factually notorious censure does not necessarily presuppose the commission of a notorious delict. If the delict is public and the resultant censure is notorious, the delict itself will thereby become notorious. However, a censure may become factually notorious while the delict for which it was incurred remains

[53] D'Annibale: "*Ne ministret indigne,* idest indignus ipse; verum quia non ministrat *ex officio,* et minister est quasi *per consequens,* a letali excusatur. Demum ne ministret indigno: hoc in cooperationem recidit, quam sola caritas vetat; cumque caritas non obliget cum incommodo gravi, sine quo vix, aut ne vix quidem quis abstinet a nuptiis, vix hoc nomine reprehendendus erit, aut ne vix quidem."—*Summula Theologiae Moralis* (5. ed., 3 vols., Romae, 1908, III, n. 462; Cappello, *De Sacramentis,* I, n. 59 seq., III, n. 334; Noldin-Schmitt, *Summa Theologiae Moralis,* III, n. 30; Génicot-Salsmans, *Institutiones Theologiae Moralis* (10. ed., 2 vols., Bruxellis: Alb. Dewit, 1922), II, n. 115; Hyland, *op. cit.,* p. 99; Conran, *op. cit.,* pp. 112-113.

[54] Génicot-Salsmans, *op. cit.,* II, n. 464 (nota 1). Cf. canons 2258, 2267.

occult. This opinion is supported by Chelodi,[55] Cappello,[56] Ayrinhac-Lydon,[57] Moriarty,[58] Rossi,[59] Payen[60] and Donovan.[61] Coronata states simply that a censure is notorious when the delict is notorious.[62]

A censure may also be notorious by *notoriety of law.* It is a legally notorious censure after a declaratory or condemnatory sentence has been issued, or after a juridical confession has been made by the delinquent.[63] This is held by most of the canonists who discuss the notion of the notoriety of a censure[64] It should be noted that, as Moriarty well observes,[65] a legally notorious censure may be *de facto* occult, if the judicial sentence or the juridical confession has not been, and will not be, brought to public attention. Thus, the notoriety of a legally notorious censure differs from that of a legally notorious delict. A legally notorious delict necessarily presupposes a publicly known delict. On the contrary, a legally no-

[55] *Ius Poenale,* n. 34.

[56] *De Censuris,* n. 5.

[57] *Marriage Legislation,* n. 116.

[58] *The Extraordinary Absolution from Censures,* The Catholic University of America Canon Law Studies, n. 113 (Washington, D. C.: The Catholic University of America, 1938), p. 87.

[59] "De sacerdotibus qui matrimonium etiam civile tantum contrahere praesumpserint quoad absolutionem a censura de qua in can. 2388, § 1"—*Periodico Munus* (Torino, 1926—), XI (1936), 534 (nota 1).

[60] *De Matrimonio in Missionibus ac Potissimum in Sinis, Tractatus Practicus et Casus* (2. ed., 3 vols., Zi-ka-wei: in typographia T ÒU-SÉ-WÉ, 1935-1936), I, n. 922.

[61] *The Pastor's Obligation in Pre-nuptial Investigation,* p. 274.

[62] *Institutiones Iuris Canonici,* I, n. 679. But, cf. Coronata, *op. cit.,* IV, n. 1742.

[63] Cf. canon 2197, 2°.

[64] Hyland, *op. cit.,* p. 101; Conran, *op. cit.,* p. 113; Payen, *op. cit.,* I, n. 922; Farrugia, *op. cit.,* n. 141; Vlaming, *op. cit.,* n. 247; Cerato, *op. cit.,* n. 60; Chelodi, *Ius Matrimoniale,* n. 67; Ayrinhac-Lydon, *Marriage Legislation,* n. 116; Schenk, *op. cit.,* p. 94; Moriarty, *op. cit.,* pp. 87-88.

[65] *Loc. cit.*

torious censure may or may not become publicly known. Accordingly, only those cases will be considered under canon 1066 as involving notoriously censured persons in which the censure, as such, independently of the delict, is notorious either by notoriety of fact, or by notoriety of law which becomes publicly known. This view is in harmony with the age-old axiom: "*Odiosa sunt restringenda.*"

3. Public Sinners

The Code of Canon Law does not define the notion of *public sinner,* nor does it determine precisely all those who are to be classed as public sinners. Recourse to the pre-Code law shows that there prevailed a rather comprehensive notion as to those persons who, according to the law, were considered as public sinners. The common opinion among pre-Code canonists, so Many relates, was that "public and manifest sinners" included all those who died publicly impenitent, and those who lived in a state of *notorious* sin, for example, those who lived in a state of notorious concubinage or prostitution, those whose work or duty could not be performed without their committing sin, and members of condemned societies. Furthermore, notoriety was an essential element to be verified before one might be designated a public sinner.[66]

Whether this interpretation of the term *public sinner* can be considered to have been retained in the new law is not certain. Two problems arise in this matter. Is *notoriety,* as explained earlier in reference to delicts, an essential note in the designation of a *public sinner?* Does the term *public sinner* refer only to those who are guilty of public (or notorious) *delicts,* or does it include also those who commit a public (or notorious) *sin* which is not prohibited by a law to which is attached a canonical sanction or penalty?

A delict is essentially an external and morally imputable violation of a law to which a canonical sanction, at least indeterminate, has been attached.[67] Sin is a morally evil human

[66] *De Locis Sacris* (Paris, 1904), n. 220.

[67] Canon 2195, § 1.

act by which man freely transgresses the law of God. It is thus quite possible that one may commit a *public sin* which is not necessarily at the same time a *public delict*. The two are not necessarily identical, although in a particular case they may be such. It is evident that the notion of public sinner certainly includes those who are guilty of either notorious or public delicts. Every delict is a sin, and publicity is verified in both public and notorious delicts.

The majority of canonists who discuss the matter considers that the notion of *public sinner* includes also public sinners as such, that is, even if they have not committed a canonical delict—a public sin which is prohibited by a canonically sanctioned law. Thus, Cappello states that the notion of public sinner requires as essential elements that there be a *grave sin which is publicly known* and still perdures, at least by reason of the scandal which it effected.[68]

The opinon of the vast majority of canonists, which does not restrict the notion of *public sinner* to one who is guilty of a public delict but includes also the person who has committed a public sin as such, reflects the only definition or explanation of a public sinner which has been given by the Holy See. This was contained in the most detailed of four particular legislative enactments of the Holy See in reference to the contracting of marriage by Catholics with public sinners. This particular decree was issued by the Sacred Congregation of the Council on August 28, 1852.[69] It described the *public sinner* as one whose *mortally sinful condition* not only could be, but necessarily had to be, concluded from some public and external act.

The notion of the term *public sinner* as it is explained by the majority of canonists and moralists will be the one understood here concerning the public sinners who are referred to in canon 1066. It will include public sinners as such, to-

[68] *De Sacramentis*, I, n. 74.

[69] *Fontes*, n. 4127.

gether with those who are guilty of canonical delicts,[70] either public or notorious. Therefore, the term *public sinner* includes: (1) the delinquents who are mentioned in canon 1065, whether their delict is notorious or only public; (2) those who are guilty of any notorious[71] or public[72] delict, even if they have not notoriously, either legally or factually, incurred the censure of excommunication or of interdict; and (3) all those who are guilty of a grave sin which is publicly known and still perdures, at least by reason of the scandal which it effected.

To be designated a public sinner it suffices that the sin have attained the *publicity* which is predicated of a public delict, that is, that it be divulged and commonly known, or at least practically certain to become so. Since every delict is a sin, no greater publicity is required for the designation of a public *sinner* than for that of a public *delinquent*. Accordingly, a public sinner is one who is guilty of a grave sin that is either public or notorious.

This opinion is substantiated by the explanation of the notion of public sinner which is given by most canonists. Thus, Cappello describes a public sinner as one whose unworthiness, practically regarded, has become *commonly known*.[73] He thereby applies to the designation *public sinner* the notion of publicity which is predicated of a public delict by canon 2197, n. 1. This application of the definition which is given by the Code is explicitly defended by Vlaming.[74]

Most canonists and moralists rightly explain that publicity is verified in public sin not only when the sin is public strictly so-called, but also when it is notorious, in the sense in which

[70] Cf. canons 2314-2414.

[71] *Cf.* canon 2197, 2°, 3°.

[72] Cf. canon 2197, 1°.

[73] "Is dicitur *publicus* peccator, cuius indignitas ad communem, moraliter loquendo, notitiam venerit."—*De Sacramentis,* III, n. 332. Cf. also Cappello, *op. cit.,* I, n. 74.

[74] *Praelectiones Iuris Matrimonii,* I, n. 246.

publicity and notoriety are predicated of delicts in canon 2197.[75]

4. Corollary: Persons Not Subject to Canons 1065-1066

a. *Non-Catholic Members of Condemned Societies*

It may be asked if non-Catholic members of condemned societies come within the scope of canon 1065. If a Catholic is about to contract marriage with a non-Catholic, is it necessary to obtain not only a dispensation from the particular impediment involved,[76] but also the permission of the local Ordinary in accordance with canon 1065?

Quigley seems to hold that such permission of the Ordinary must be obtained in addition to the dispensation from the impediment.[77] On the other hand, Ayrinhac-Lydon,[78] Woywod[79] and Donovan,[80] in their commentary on canon 1065, refer only to the cases in which a Catholic is a member of a condemned society. This latter opinion reflects the positive legislation which was contained in eight decrees issued by the Supreme Sacred Congregation of the Holy Office, especially in its fifth decree on this matter on January 30, 1867,[81] in its sixth decree on April 23, 1873 and in its seventh decree on July 2, 1878.[82]

Furthermore, to include non-Catholic members of condemned societies under canon 1065 and to require permission

[75] Cappello, *loc. cit.;* Vlaming, *loc. cit.;* Vermeersch-Creusen, *Epitome,* II, n. 117; Ayrinhac-Lydon, *Marriage Legislation,* n. 116; Davis, *Moral and Pastoral Theology* (2. ed., 4 vols., New York: Sheed & Ward, 1936), III, p. 35; Ayrinhac, *Legislation on the Sacraments in the New Code of Canon Law* (New York: Longmans, Green & Co., 1928), n. 145; Gougnard, *De Matrimonio,* p. 136; Noldin-Schmitt, *Summa Theologiae Moralis,* III, n. 37.

[76] Canons 87, 1060 and 1070.

[77] *Condemned Societies, pp.* 106-107.

[78] *Marriage Legislation,* n. 115.

[79] *A Practical Commentary on the Code of Canon Law,* I, n. 1044.

[80] *The Pastor's Obligation in Pre-nuptial Investigation,* p. 272.

[81] *Fontes,* n. 998.

[82] *Fontes,* nn. 1026, 1056.

of the local Ordinary, in additon to the dispensation from the particular impediment involved, seems repetitious and purposeless. For, the grave cause for allowing the marriage, and the guarantees (*cautiones*) of the Catholic education of all the offspring, as well as the elimination of the danger of perversion for the faithful Catholic party, all of which factors are stressed in canon 1065, § 2, as conditions that must be fulfilled in the prudent judgment of the Ordinary before he can lawfully permit the contracting of the contemplated marriage, will already have been realized preparatory to the validity of the particular dispensation involved.[83]

The main reason for submitting such cases to the local Ordinary is to obtain his prudent judgment on the verification of certain conditions which are required by both the divine and the ecclesiastical law before such otherwise dangerous marriages may be allowed to Catholics. Since these conditions are verified before the dispensation from the canonical impediment is granted, there is no need of a second consideration of the matter. The dispensation fulfills the purpose of the legislator, for it presupposes, in relation to the very validity of the granted dispensation, and also of the consequent marriage itself if the impediment was one of disparity of cult, the fulfillment of all the conditions which canon 1065, § 2, requires to be fulfilled in relation to the lawfulness of the permission for the contracting of the marriage. The fulfillment of the greater demand—the dispensation—naturally includes the observance of the lesser requirement—the permission. Hence, no additional permission is necessary when all the demands for the valid and lawful granting of the required dispensation have been satisfied.

Since it is possible that the danger of perversion for the faithful Catholic party may be feared more from the non-Catholic's membership in a condemned society than from his status as a non-Catholic, such membership should be mentioned in the petition for the required dispensation from the

[83] Cf., e. g., canons 1061, 1071.

canonical impediment to the marriage. It will be a record of the fact that the non-Catholic's membership in a condemned society has been taken into consideration by the priest who conducted the prenuptial investigation in arriving at the required moral certitude concerning the fulfillment of the prenuptial promises or guarantees of each party.

b. *Baptized Catholics With No Religious Education*

A practical problem arises in the determination of the status of a person who was baptized a Catholic but who was reared without any religious training. It is possible that up until the time of his contemplated marriage he may not even know that he was baptized. He may have attended only the so-called non-sectarian schools and colleges and have been taught a completely materialistic philosophy of life. People of his community may presume that he is not a Catholic. At least, he is never seen attending services in the Catholic Church or in any other church. Is such a person an apostate?

Although he may be presumed to be materially an apostate in view of canon 2200, § 2,[84] he cannot be designated as a notorious apostate, that is, as one who is known publicly to the community to have realized that he was acting wrongfully in neglecting the practice of his faith and to have, nevertheless, abandoned the faith deliberately. Since he has not joined any non-Catholic sect, he is not to be considered as a non-Catholic, nor is he subject to the prescriptions regarding the impediment of mixed religion if he contracts marriage with a Catholic.[85] Consequently, his canonical status is that of a Catholic who is ignorant of the truths of the faith.

If he is personally responsible for his lack of education and training in the Catholic religion, his consequent neglect of his religious duties, if publicly known, will bring him within the scope of canon 1066 in the external forum as at least a ma-

[84] "Posita externa legis violatione, dolus in foro externo praesumitur, donec contrarium probetur."

[85] Cf. canon 1060.

terial *public sinner,* and of canon 1020, §2, as in need of instruction in Christian Doctrine. However, if he proves that he is not personally responsible for his condition, he is neither a formal nor a material public sinner.[86] However, he comes within the scope of canon 1020, § 2, as in need of instruction in Christian Doctrine, and of canon 1033, which declares that the pastor should earnestly exhort him to prepare for and receive the Sacraments of Penance and the Holy Eucharist before contracting marriage.

c. *Non-Public Sinners*

The Code of Canon Law provides definitively the universal law which determines the relation of prenuptial confession and the reception of Holy Communion to the Sacrament of Matrimony. For the lawfulness of the valid marriage of Catholics who are public sinners there is a positive prescription of the Code which demands prenuptial reception of the Sacrament of Penance.[87]

On the other hand, for the lawfulness of the valid marriage of Catholics who are not public sinners, the Code has not included among the matrimonial impediments in canons 1058-1080 the omission of the reception of the Sacraments of Penance and the Holy Eucharist. Neither has it prescribed the reception of these Sacraments as a necessary condition for the lawfulness of such valid marriages. The Code has limited itself to the declaration in canon 1033 that the pastor should, as part of his obligation in prenuptial investigation, earnestly exhort the contracting parties to confess their sins diligently and to receive Holy Communion devoutly before their marriage.

It may happen that the contracting parties will be unable to comply with this admonition of canon 1033 because of their lack of sufficient instruction in Christian Doctrine. Often this will be traceable to the fact that, although they were bap-

[86] Cf. canon 2200, § 2.

[87] Canons 1065-1066.

tized as Catholics, they have not been reared and educated as Catholics. Although they have not joined any non-Catholic sect, they may or may not consider themselves to be Catholics. In such cases the priest should carefully teach them at least the first elements of Christian Doctrine and prepare them for their first confession and reception of Holy Communion. However, some may refuse absolutely to take the instructions. Others may be willing to take the instructions and may actually have attended several conferences for this purpose but there may be insufficient time remaining for a proper course of instructions before the date which has been selected for the marriage. Despite such a condition, the parties may refuse to postpone the marriage until they are instructed sufficiently to receive the Sacraments of Penance and the Holy Eucharist. In all such cases of refusal, the priest should not, in line with the prescriptions for other cases in canon 1066, forego assisting at the proposed marriage of Catholic parties. This was established conclusively in a response of the Pontifical Commission for the Interpretation of the Code on June 3, 1918. The Commission declared that if Catholic parties refuse to take the necessary instruction to remedy their ignorance of Christian Doctrine, they are not to be looked upon as *public sinners*, and the pastor should not for that reason decline to assist at their marriage, as is prescribed for other cases in canon 1066.[88] This authentic interpretation of canon 1020, § 2, was repeated in the Instruction which was issued by the Sacred Congregation of the Sacraments on June 29, 1941, on the rules to be followed by the pastor in making the canonical inquiries before he permits the contracting parties to enter marriage.[89]

On the other hand, Catholic contracting parties may be sufficiently instructed in Christian Doctrine, but may refuse to go to confession because they have been neglecting their re-

[88] *AAS*, X (1918), 345.

[89] *AAS*, XXXIII (1941), 297; reported in THE JURIST, II (1942), *Supplement* (January, 1942), p. 7.

ligious duties without becoming public sinners in the sense of canon 1066. In other instances they may actually go to confession, but may be found by the confessor to be not properly disposed to receive sacramental absolution.

In all these cases, if the parties will not postpone their marriage until they are sufficiently instructed and properly disposed to receive the Sacrament of Penance, the priest must inform them that they are obliged to be free from mortal sin and in the state of sanctifying grace in order to receive worthily the Sacrament of Matrimony. Otherwise, they will be guilty of sacrilege and grave sin by receiving a Sacrament of the Living while they are in the state of mortal sin.

With the exception of the Sacrament of Matrimony in the case of public sinners[90] and the Sacrament of the Holy Eucharist,[91] there is no positive prescription of canon law which requires that the state of sanctifying grace be obtained through the sacramental absolution of mortal sin before one may administer or receive a Sacrament. Furthermore, not even the divine law imposes such an obligation. Accordingly, the priest must warn those who are not public sinners and who refuse to become sufficiently instructed and to go to confession that they must acquire the state of sanctifying grace before their marriage at least by eliciting an act of perfect contrition.[92]

Whatever may be the result of these recommendations by the priest, he should not refuse to marry such *non-public* sinners. Now that the common law of the Church has made prenuptial instruction in Christian Doctrine[93] and the reception of the Sacraments of Penance and the Holy Eucharist[94] no more than a matter of urgent recommendation, and does

[90] Canons 1065-1066.

[91] Canons 807; 856.

[92] *Cf. Collectanea S. Congregationis de Propaganda Fide,* I, n. 707; *Fontes,* nn. 4716, 861, 4784, 4127.

[93] Canon 1020, § 2.

[94] Canon 1033.

not exact the compliance of the parties with such recommendations as an essential condition for their admission to marriage, it is quite certain that a local Ordinary cannot decree that their non-compliance is to be regarded as the equivalent of an impedient impediment.[95] He would thus exact more of the parties than does the Holy See. However, it seems permissible, in a given case, for the local Ordinary to forbid a party to marry for a time, until adequate instructions are given and renewed efforts are made properly to dispose the party for confession and the reception of Holy Communion, if in his prudence he deems this procedure to constitute a necessary measure of pastoral discipline. However, there would have to be a just cause present, for example, the danger of scandal, to warrant such a procedure, and the postponement of the marriage could be protracted only so long as the just cause continues.[96]

Accordingly, a definite period of time should be fixed by the local Ordinary, in each particular case, during which efforts are to be renewed to correct the dispositions of such parties and beyond which time their marriage is not to be deferred. On the contrary, to go beyond this limit and to make it a general rule that no Catholics will be admitted to marriage until they have been sufficiently instructed in Christian Doctrine and have received the Sacraments of Penance and the Holy Eucharist seems to offend against the prescription of canon 1038, § 2.

d. *Persons With Prenuptial Agreement or Intention on Birth Control*

In some prenuptial investigation questionnaires and in some antenuptial guarantees (*cautiones*) there appears the wording of a promise to be given by both parties to the effect that they shall "lead a married life in conformity with the teachings of the Church regarding birth control, realizing fully the attitude of the Catholic Church in this regard."

[95] Canon 1038, § 2.

[96] Canon 1039, § 1.

Such a promise or condition is nowhere demanded in the Code, in the Quinquennial Faculties, or in the Instruction which was issued on June 29, 1941, on the rules to be followed by the pastor in making the canonical inquiries before he permits the contracting parties to enter marriage.[97] However, a marriage would be rendered invalid on the grounds of an intention *contra bonum prolis,* if the parties to the marriage were to exclude their consent relative to that essential element in the matrimonial contract which is called the *bonum prolis.*[98]

The difficulty in the definitive settlement and solution of such cases is the necessity to determine satisfactorily in the external forum the nature of the condition or intention under which the particular marriage is being contracted. At all times there must be kept in mind the essential distinction between the strict right to the marital act and the exercise of that right. An *agreement,* tacit or expressed, or even an *intention* of only one of the parties to abuse the marital right, even though perpetually, does not invalidate the marriage, as long as the right itself to the proper conjugal acts is mutually interchanged in the matrimonial contract. In fact, the intention to abuse the right argues the recognition of the right itself.[99] When a doubt arises after a marriage has been contracted as to whether the contractants positively willed to

[97] Cf. S. C. de Sacr., instr., *De normis a parocho servandis in peragendis canonicis investigationibus antequam nupturientes ad matrimonium ineundum admittat* (*Can. 1020*), 20 iun. 1941, nn. 8, 9, and Questionnaire (Allegatum) I, nn. 13, 16, 17—*AAS,* XXXIII (1941), 297, reported in The Jurist, II (1942), *Supplement* (January, 1942), and in *The Ecclesiastical Review,* CV (1941), *Supplement.*

[98] Canon 1086, § 2.

[99] Cf. Doheny, *Canonical Procedure in Matrimonial Cases* (Milwaukee: The Bruce Publishing Company, 1938), pp. 573-574, 577-580, 618-630; McCarthy, "Marriage Under Birth Control Conditions"—*Irish Ecclesiastical Record* (Dublin, 1864—; 5th Series, 1913—), LVII (1941), 71-76, 348-356. However, if such abuse of marriage were to be attached to marital consent as a "*conditio sine qua non,*" the marriage would be invalid and the priest could not assist at it. Cf. canon 1092, n. 2°.

exclude the conjugal right or merely intended abuses in the exercise of this right, the presumption of law favors the marriage.[100] Hence it is possible for the parties at the time of the marriage to have the intention of sinning, which is entirely compatible with true matrimonial consent, rather than the intention of excluding conjugal rights.

In view of local conditions an Ordinary may feel it necessary to exact in this matter a promise from the parties. Even though the validity of the marriage may not be involved, there is always the matter of grave sin when marriage is entered with an *intention* to abuse its sacred rights. As a result, a local Ordinary may consider that such a promise is desirable as an effective means of averting this moral danger. However, it is extremely doubtful whether such a promise can be exacted by the Ordinary as an essential condition for the validity of a dispensation or for the granting of permission to contract a marriage to which the parties have a natural right.[101]

Although such an intention to abuse the rights of marriage does not affect the validity of the matrimonial contract, it is, nevertheless, a sinful intention which accompanies the intention to contract marriage. If this sinful intention on the part of one or both of the Catholic contracting parties is publicly known (for example, from public statements, from membership or affiliation with leagues or associations which promote birth control and unnaturally planned parenthood), and if this intention is not retracted publicly by means of sacramental confession, the contemplated marriage then is one which involves a *public sinner*. It thus becomes subject to the prescriptions of canon 1066. The pastor may assist at such a marriage if there is a *grave* reason, for example, to prevent a

[100] Canons 1014; 1869, §§ 1, 4.

[101] Cf. Boyle, *The Juridic Effects of Moral Certitude on Pre-nuptial Guarantees*, The Catholic University of America Canon Law Studies, n. 150 (Washington, D. C.: The Catholic University of America Press, 1942), pp. 141-142. Cf. also canons 1035; 1068, § 2.

marriage from being attempted civilly. In such a case the pastor is presented with two evils which cannot both be prevented. In such circumstances the natural law not only permits but prescribes that the lesser of the two evils be selected.[102]

If the sinful intention to abuse the marital right is not publicly known, the guilty party will remain a non-public sinner. There will then not be present the canonical prohibition of canon 1066 against the marriage of a Catholic with such a person. Consequently, there will be no obligation for the pastor to consult the Ordinary for judgment on the gravity of a reason for permitting such a marriage or for his direct permission to assist at it. The pastor cannot refuse to assist at the marriage of such an occult sinner, whether his knowledge of the sinful intention has been obtained in the sacramental or extra-sacramental, internal forum.[103] Of course, the pastor should endeavor to have the guilty party retract such a sinful intention either by going to confession or at least by eliciting an act of perfect contrition. But, to demand prenuptial confession would be to demand more than the Church prescribes. Canon 1033 simply declares that the pastor should earnestly exhort the contracting parties to go to confession and receive Holy Communion before their marriage. Therefore, the pastor cannot insist on prenuptial confession as a prerequisite condition before he will assist at the marriage of such non-public sinners.

In cases of this kind, whether the parties be public or occult sinners, the pastor may, as a last resort and after he has exhausted every other means to influence the parties to retract their intention to practice birth control, *insinuate* or suggest the " rhythm theory " or the " safe period " practice. Regardless of the divided opinions which are held concerning the ob-

102 Cappello, *De Sacramentis,* III, n. 192; Aertnys-Damen, *Theologia Moralis,* I, nn. 258, 379, 776.

103 Cappello, *De Sacramentis,* III, n. 332; Aertnys-Damen, *Theologia Moralis* II, nn. 19-22.

jective morality of such periodic continence, it may be permitted as the lesser of two evils.[104]

It should be noted that it is not impossible for the right to the conjugal act to be excluded by a prenuptial agreement to the use of the "safe period" method. The precise intention of the contracting parties determines the matter. If they positively will and intend to deny one another the very marital *right,* even if only at stipulated times and in the strict sense of the terms, the marriage is invalid. The actual exclusion of the right itself is not often verified in such cases. Usually it is a matter of restricting the *exercise* of the conjugal right and hence the marriage is valid.[105]

II. Canons 1065 and 1066 Contain a Prohibition and Not an Impediment to Marriage

A verification of the various conditions which bring a Catholic within the scope of canons 1065 or 1066 as notoriously or publicly unworthy establishes a legal inequality or difference between such a person and a faithful Catholic who is presumably in the state of grace.[106] In view of this serious difference the legislator has decreed that Catholics are to be deterred from contracting marriage with such notoriously or publicly unworthy Catholics.

As has been seen, in the contracting of marriage by a Catholic with a notoriously or publicly unworthy Catholic as described in canons 1065 and 1066, there can be no impediment of disparity of cult, since both parties have been baptized.[107] Neither can there be a canonical impediment of mixed religion

[104] Cf. Griese, *The Morality of Periodic Continence* (Washington, D. C.: The Catholic University of America Press, 1942), pp. 75-79, 94, 98-105, 111-112.

[105] Doheny, *Canonical Procedure in Matrimonial Cases,* pp. 620-621; Mahoney, "Matrimonial Consent and the 'Safe Period'"—*The Clergy Review* (London, 1931——), XIII (1937), 121-131, 412-413; XIV (1938), 184-185; XV (1938), 398.

[106] Schenk, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult,* p. 79.

[107] Canons 1070-1071.

since the unworthy Catholic has not joined a non-Catholic sect.[108] Not only is the prohibition of canons 1065 and 1066 not the impediment either of disparity of cult or of mixed religion, but even considered in itself it is not a canonical impediment. Such is the opinion of the vast majority of canonists and moralists.[109]

A study of the canonical legislation on matrimonial impediments in general verifies this opinion.[110] Canon 1040 declares that only the Roman Pontiff can abolish or modify the ecclesiastical impediments of marriage, both impedient and diriment; and, likewise, no one else can dispense from these impediments unless this power has been conceded to him either in the common law or by a special indult of the Holy See. In other words, dispensation from matrimonial impediments is reserved to the Holy See, with the exceptions mentioned. The concessions of the common law are those which are contained in canons 15, 81, 1043-1045 and 1098. Each of these canons refers to a dispensation from various laws and from the matrimonial impediments as being ordinarily reserved to the Holy See but, under extraordinary circumstances, as being subject to dispensation by local Ordinaries and, in certain cases, by priests and confessors. In all these cases it is clear that the impediment and the dispensation which are referred to are really such in the strict sense of the terms. In the canons concerning impedient impediments it is clear that the particular type of marriage which is referred to is prohibited as

[108] Canons 1060-1064.

[109] Cerato, *Matrimonium,* n. 61; Chelodi, *Ius Matrimoniale,* n. 65; Vlaming, *Praelectiones Iuris Matrimonii,* n. 243; Wernz-Vidal, *Ius Canonicum,* V, nn. 173, 200-201; Farrugia, *De Matrimonio,* n. 139; Ayrinhac-Lydon, *Marriage Legislation,* n. 115; Blat, *Commentarium,* III, Pars I, n. 460; Vermeersch-Creusen, *Epitome,* II, n. 335; Augustine, *A Commentary,* p. 135; Génicot-Salsmans, *Institutiones Theologiae Moralis,* II, n. 509; Noldin-Schmitt, *Summa Theologiae Moralis,* III, nn. 562, 567; Quigley, *Condemned Societies,* p. 99; O'Keeffe, *Matrimonial Dispensations, Powers of Bishops, Priests and Confessors,* The Catholic University of America Canon Law Studies, n. 45 (Washington, D. C.: The Catholic University of America, 1927), pp. 187-188.

[110] Canons 1035-1057.

unlawful.[111] The canons concerning diriment impediments make it clear that the marriages which are contracted in contravention of such impediments are invalid.[112]

On the other hand, in canons 1065 and 1066 there is a complete change in notion and in legal phraseology. There is neither the same mention nor the same notion of an impediment strictly so called. Neither is there any reference, explicit or implicit, to a dispensation in the strict sense, reserved to the Holy See or subject to being granted by intermediate authority. Canon 1065 contains a strong *exhortation* that the faithful be *deterred* from contracting marriage with a notoriously unworthy Catholic. When the efforts made in response to this exhortation prove ineffectual, it is not a dispensation from the impediment of mixed religion but a *permission* for the pastor to assist at such a marriage which, as the law declares, may be granted by the local Ordinary.[113] Similarly, in canon 1066 it is stated that the pastor is forbidden to assist at the marriage of the faithful with certain unworthy Catholics unless a grave cause warrants such assistance. The canon declares, at least *implicitly,* that *permission* must be obtained when it states that the pastor should, if possible, *consult* the local Ordinary for his judgment as to the verification of the grave cause which is required by the law before the pastor may assist at the marriage.[114] Definitely, then, canons 1065 and 1066 contain not a canonical impediment in the strict sense, but a prohibition.

It may well be asked why the prohibition which is contained in these canons is not an impediment. Not many canonists have discussed this question. The solution to the problem cannot be obtained by comparing an impediment with public

[111] Canons 1060-1064.

[112] Canons 1067-1080.

[113] Canon 1065, § 2: "Parochus praedictis nuptiis ne assistat, nisi consulto Ordinario qui...ei *permittere* poterit ut matrimonio intersit,..."

[114] Canon 1066: "...parochus eius matrimonio ne assistat, nisi *gravis* urgeat *causa, de qua,* si fieri possit, *consulat* Ordinarium."

unworthiness, which is not a prohibition but is the basis of the prohibition in canons 1065 and 1066. It can be obtained only by comparing the basis of the prohibition with the basis of the impediments of mixed religion and disparity of cult.

Disparity of cult is a diriment impediment inasmuch as it is founded on the *radical* difference between the baptized and the unbaptized, which excludes the possibility of contracting a *matrimonium ratum.* Mixed religion is a prohibitive or impedient impediment inasmuch as it represents not a radical difference but an *accentuated modal inequality* between a Catholic and a sectarian baptized non-Catholic. It is a modal inequality since it arises through the difference in their profession of faith and it is accentuated by the formal adherence of one to a sect which is either heretical or schismatic. The marriages which are contemplated in canons 1065 and 1066 are prohibited in view of a modal difference which exists also between Catholics and publicly unworthy Catholics. The reason for which a public unworthiness is the basis of a simple prohibition, and not of a canonical impediment, is that such an unworthiness does not establish the *accentuated* modal difference which results from formal adherence in a non-Catholic sect.[115]

III. Permission to Assist, Not a Dispensation From the Impediment of Mixed Religion, Must Be Sought From the Ordinary

If the priest discovers that a person belongs to one of the categories of publicly unworthy Catholics, it is of the utmost importance that he learn whether or not such a party has joined a non-Catholic sect. If a publicly unworthy Catholic belongs to such a sect, a Catholic is seriously prohibited from contracting marriage with him by reason of the impediment of mixed religion.[116]

If the priest discovers that the person has not joined a non-Catholic sect, his first pastoral obligation will be to make a

[115] Cf. canons 1015, 1060, 1070, § 1; Schenk. *op. cit.*, pp. 80-81, 97.

[116] Canon 1060.

serious effort to bring about a public reconciliation with the Church on the part of the publicly unworthy Catholic. If these zealous efforts are not favored with success, the pastor will then be obliged to endeavor to avert the contemplated marriage. However, as a general rule, it will be morally impossible on such occasions for the pastor to deter the faithful from entering such a marriage. The earnest persuasions of the pastor usually will not have very much influence on the Catholic party at that late date. Consequently, if the pastor is convinced that his efforts to deter the Catholic from such a marriage will prove fruitless, prudence will dictate that he concentrate his efforts on providing that the marriage be celebrated in accordance with the laws of God and the Church.

Before the pastor or his delegate, or the parochial assistant or his subdelegate, may assist at the marriages of the faithful with publicly unworthy Catholics, certain conditions must be fulfilled. Common to both categories of unworthy Catholics in canons 1065, § 2, and 1066 are the requirements of a *grave* cause and the need of previous consultation of the local Ordinary by the priest. The two canons differ (at least in theory, if not in practice) as regards the responsible authority to pass judgment on the gravity of the cause, the extent of the obligation to consult the local Ordinary, and the import of the resultant decision of the Bishop.

Only canon 1065, § 2, refers explicitly to the granting of permission by the local Ordinary for the pastor to assist at the marriages of certain notoriously unworthy Catholics.[117] Nevertheless, canon 1066 at least implicity demands such permission since it prescribes that, if possible, the local Ordinary should be consulted for his judgment on the gravity of the reason for justifying the assistance of the priest at the marriages of certain unworthy Catholics.

As has been seen, the prohibition in canons 1065 and 1066 is not a canonical impediment and its removal is effected not by a dispensation but by a *permission* to assist at such marriages.

[117] ". . .consulto Ordinario, qui, . . .ei permittere poterit. . . ."

In practice, the obligation to consult the local Ordinary is equally grave in canon 1065 and, at least under ordinary conditions, in canon 1066. It is only in the extraordinary case in which the local Ordinary cannot be consulted that canon 1066 grants the pastor the power to pass judgment on the gravity of the reason for his assistance at the marriages of the faithful with Catholics who are either public sinners or notoriously under censure. Canon 1044 may be invoked to permit the pastor to assist at the marriages which are referred to by canon 1065, but only *urgente mortis periculo*.

In all cases in which the local Ordinary has not been consulted previously, he should be notified as soon as possible after the marriage. The usual formalities which he may require should be complied with in all cases.[118]

The obligation of the pastor or of the assisting priest to consult the local Ordinary and to obtain his permission in all these cases is a serious one and ordinarily binds *sub gravi*.[119]

IV. The Necessity of a Grave Cause for Permission

Both canon 1065, § 2, and canon 1066 require the presence of a *grave* cause before the priest may assist at the marriages of the faithful with publicly unworthy Catholics. It may appear that the responsible authority to decide on the *gravity* of the cause in these cases varies according to the classification of the unworthy Catholic. In the cases of those who are guilty either of notorious defection from the Catholic faith without joining a non-Catholic sect, or of notorious membership in condemned societies, it is evident that canon 1065, § 2, reserves the decision exclusively to the local Ordinary. In the cases of those who are either public sinners or notoriously under ecclesiastical censure, canon 1066 seems to leave to the pastor the decision on the gravity of the cause for assisting at

[118] This procedure is prescribed in analogous circumstances by canon 1046: "Parochus aut sacerdos de quo in can. 1044, de concessa dispensatione pro foro externo Ordinarium loci statim certiorem faciat; eaque adnotetur in libro matrimoniorum." Cf. canon 2383.

[119] Cappello, *De Sacramentis*, III, nn. 331, 332.

such marriages. However, since canon 1066 states that the pastor should, if possible, consult the Ordinary about the gravity of the cause, it is the latter who is ordinarily to give the decision. It is only in the extraordinary cases in which the local Ordinary cannot be consulted that the pastor himself may render this decision. Canon 1065, § 2, does not give such power to the pastor in the cases which come within its scope. Under ordinary conditions, then, it is the local Ordinary who is to pass judgment on the gravity of the cause for permitting the assistance of the pastor at the marriages of the faithful with any of the several types of notoriously or publicly unworthy Catholics.

Causes which are considered sufficient to justify the granting of a dispensation from the impediments of mixed religion or of disparity of cult are likewise of sufficient gravity to warrant the cessation of the prohibition of canons 1065 and 1066.[120] These reasons are found listed in an Instruction of the Sacred Congregation for the Propagation of the Faith of May 9, 1877.[121]

Canon 1065, § 2, states that the local Ordinary should consider all the circumstances of the individual case. He may grant the necessary permission provided that there is a *grave* reason for allowing the marriage and provided that in his prudent judgment there is present a sufficient safeguarding of the Catholic education of all the offspring and the danger of perversion of the other Catholic party is properly obviated. As is evident, there is nothing in these conditions which restricts them to those cases alone which come within the scope of canon 1065. Of their very nature they should also be verified in those marriages which are referred to in canon 1066. The same dangers are found in these latter marriages, though the dangers may be more remote than in the cases under canon

[120] Vermeersch-Creusen, *Epitome*, II, n. 335.

[121] *Collectanea S. C. P. F.*, n. 1470. Cf. Vermeersch-Creusen, *Epitome*, II, n. 318. Cf. Quigley, *A Summary of the Canon Law on Matrimonial Impediments and Dispensations* (2. ed., Philadelphia: The Dolphin Press, 1942).

1065. The conditions of canon 1065, § 2, are requirements of the divine natural law and must be fulfilled in all cases. Otherwise, the Ordinary cannot grant permission for the priest to assist at the marriage.[122] Thus, the Ordinary is to decide these cases in much the same way as those of mixed marriage.

In his study of the circumstances which are presented by the pastor for the individual case, the local Ordinary will investigate the verification of the following definite series of conditions which bring the case within the scope of canon 1065 or canon 1066. The contracting parties must be Catholics by baptism or by conversion. Neither party is to have joined a non-Catholic sect. One or perhaps both of the parties are notoriously guilty either of defection from the faith or of membership in a condemned society, are notoriously under censure or are regarded as public sinners.

When he is satisfied that the case is one which concerns a *publicly* unworthy Catholic, coming within the scope of either canon 1065 or canon 1066, the local Ordinary will estimate the gravity of the reason which is presented by the priest.

As has been seen, the parties themselves are the ministers as well as the recipients of the Sacrament of Matrimony. They are forbidden under penalty of grave sin to receive the Sacrament while in the state of serious sin. They are also forbidden to administer the Sacrament while in the state of serious sin. However, the latter obligation does not bind under the penalty of serious sin, for the parties are not ordained and, therefore, are not the ministers of the Sacrament *ex officio*. If they were ordained and, consequently, the ministers of this Sacrament *ex officio*, their obligation to refuse to administer it while in the state of serious sin would bind under the penalty of grave sin. Finally, one cannot administer this Sacrament to another party who is in the state of serious public sin.

[122] Gasparri, *De Matrimonio*, (Ed. nova, 1932), I, 259-260; Wernz-Vidal, *Ius Canonicum*, V, n. 201; Cappello, *De Sacramentis*, III, n. 331; Schenk, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult*, pp. 214-216; Boyle, *The Juridic Effects of Moral Certitude on Pre-nuptial Guarantees*, pp. 73-74.

To do so is to co-operate materially in the commission of a sacrilege. However, this prohibition arises from the demand of the virtue of charity, which does not oblige men at the expense of grave sacrifice. Since it is usually a grave sacrifice for a person to abstain from marriage, the very desire to exercise the fundamental natural right to marry will generally excuse the one party from serious sin in thus co-operating materially with the *publicly* unworthy Catholic. Thus, there is usually a grave cause present to justify the material co-operation of the ministers themselves.[123]

On the other hand, the priest is obliged to prevent such a sacrilegious reception of the Sacrament of Matrimony by a *publicly* unworthy Catholic, not merely from the precept of charity but by the natural law of general or legal justice in the exercise of his pastoral office and by the positive prescription of canon law. However, the assistance of the priest as the official or qualified witness at the marriage of a public sinner is not intrinsically evil. It is not a formal co-operation in the commission of sin. It does not entail the administration of a Sacrament. Neither is it the exercise of the power of jurisdiction, although it is closely allied to it, since the right to assist at marriage is acquired by virtue of an office or through an act of delegation.[124]

If the priest were actually the minister of the Sacrament, he could never administer it to a *public* sinner. But the assisting priest acts simply as a *qualified* witness who receives the mutual consent of the parties in the name of the Church.[125] His assistance in these cases is prohibited not because it is intrinsically wrong but because of the scandal which ordinarily will be occasioned by the reception of the Sacrament by a public sinner. His assistance is, at most, a material co-opera-

[123] Noldin-Schmitt, *Summa Theologiae Moralis*, III, n. 648; Aertnys-Damen, *Theologia Moralis*, II, n. 628; D'Annibale, *Summula Theologiae Moralis*, III, n. 462.

[124] Cappello, *De Sacramentis*, III, n. 649.

[125] Cappello, *loc. cit.*

tion. Therefore, it may be permitted for a just and proportionately grave reason.[126]

If, from a denial of assistance at such a marriage, there would arise grave evils, for example, the celebration of a civil marriage, grave harm to the Church, to the priest or to the parties, etc., then permission should be granted by the Ordinary. Since not both of the impending evils can be prevented, at least the greater of the two evils must be prevented. In such a case, the natural law demands that the lesser of the two evils be permitted.[127]

V. The Prenuptial Instructions and Guarantees

Canon 1065, § 2, explicitly requires moral certainty regarding the Catholic education of all the offspring and the removal of the danger of perversion of the other party in a marriage with a publicly unworthy Catholic. These conditions are requirements of the divine natural law and must be fulfilled in all cases. Since the same dangers are present, though more remote, in the marriages referred to in canon 1066, the same conditions must be verified before the priest may be given permission to assist at such marriages. Otherwise, the local Ordinary cannot grant this permission.[128]

Moral certainty about the fulfillment of these conditions is provided for through the *cautelae* or *conditiones*. Nevertheless the vast majority of canonists holds that the formal promises are not strictly required for these cases. These canonists maintain that the means or method to be employed for securing the *cautelae*, or the moral certitude regarding the fulfill-

[126] Cappello, *op. cit.*, III, n. 332; Wernz-Vidal, *Ius Canonicum*, V, n. 202; Aertnys-Damen, *Theologia Moralis*, I, n. 397-401, II, n. 22.

[127] Cappello, *op. cit.*, III, n. 192; Aertnys-Damen, *op. cit.*, I, nn. 379, 382, II, 691. Cf. Reilly, *The General Norms of Dispensation*, The Catholic University of America Canon Law Studies, n. 119 (Washington, D. C.: The Catholic University of America Press, 1939) pp. 107-108.

[128] Gasparri, *De Matrimonio*, I, 259-260; Wernz-Vidal, *Ius Canonicum*, V, n. 201; Cappello, *De Sacramentis*, III, n. 331; Schenk, *op. cit.*, pp. 214-216; Boyle, *op. cit.*, pp. 73-74.

ment of the conditions demanded by the divine natural law, are left to the prudent judgment of the local Ordinary.[129]

This opinion is justified by a comparison of the diverse terminology used in the related canons. Canon 1061 states that the Church does not dispense from the impediment of mixed religion *unless* both parties give the prescribed *cautiones* or promises. Canon 1065, § 2, simply states that the local Ordinary may grant permission provided that he prudently judges that the spiritual welfare of all the offspring and of the other party is sufficiently safeguarded.

However, if the particular law of a diocese—promulgated either in synodal enactments or in extra-synodal decrees—requires that the *cautiones* or promises be given in writing or in some formal manner, the priest must comply with these regulations. There is nothing in canon 1065 or canon 1066 which forbids such diocesan provisions. Their specification is left to the prudent judgment of the local Ordinary.

It is to be recommended that the *cautiones* or promises be exacted of the parties by diocesan law.[130] It ought also to be decreed that the *cautiones*, whenever possible, be in writing. Such procedure is the most satisfactory means of obtaining the necessary moral certitude that the spiritual welfare of those concerned will be properly safeguarded. Moreover, the written *cautiones* will serve as a record and proof of the fact that the *cautelae* or *conditiones*, which the divine natural law always demands, have been attended to and will, according to the promises, be faithfully observed.

However, the giving of the *cautiones*, either in writing or in some other formal way, cannot be demanded as an essential condition before permission may be granted for assistance at marriages with publicly unworthy Catholics. To do so would

[129] Wernz-Vidal, *op. cit.*, V, n. 201; Cappello, *op. cit.*, III, n. 331; Payen, *De Matrimonio*, I, n. 919; Gougnard, *De Matrimonio*, pp. 135-136; Blat, *Commentarium*, III, n. 460; Ayrinhac-Lydon, *Marriage Legislation*, n. 115; Quigley, *Condemned Societies*, p. 105; Schenk, *op. cit.*, p. 256; Donovan, *The Pastor's Obligation in Pre-nuptial Investigation*, p. 273.

[130] Schenk, *op. cit.*, p. 256.

be to demand more than canons 1065 and 1066 require, and would seem to offend against the prescription of canon 1038, § 2. It suffices that the Bishop be able to judge prudently and with moral certitude from the information supplied by the priest that the *cautelae* or conditions demanded by the divine natural law will be fulfilled.

As in mixed marriage cases, so in these cases it is to be recommended that several instructions be given to the contracting parties. Such instructions will be of great benefit to both parties. For the unworthy Catholic they may provide a good opportunity to lay the foundation for his reconciliation with the Church. Moreover, the other party can be informed of the obligation to strive for that reconciliation and be advised of prudent, practical and effective means to attain that end.[131]

However, such a set of instructions ought not to be demanded as an essential condition before the granting of the necessary permission. Such a rule would be contrary to the prescription of canon 1038, § 2.[132]

VI. The Publication of the Banns

Canon 1022 states that the pastor is to announce publicly the names of those who are about to contract marriage. This law is subject to certain exceptions. Canon 1104 permits the omission of the banns in marriages of conscience. Canon 1026 forbids the publication of the banns when one of the parties is a non-Catholic, unless the local Ordinary judges otherwise. Since these are the only two exceptions which are mentioned in the Code, it follows that marriages between the faithful and the publicly unworthy Catholics who are referred to in canons 1065 and 1066 must be publicly announced.[133]

[131] Cf. canon 1062.

[132] Boyle, *The Juridic Effects of Moral Certitude on Pre-nuptial Guarantees*, p. 143.

[133] Roberts, *The Banns of Marriage*, The Catholic University of America Canon Law Studies, n. 64 (Washington, D. C.: The Catholic University of America, 1931), p. 95.

For a legitimate or just reason the publication of the banns may be dispensed either by the local Ordinary of the party in whose diocese the marriage is celebrated or by the local Ordinary of either party if the marriage is celebrated beyond the confines of their own dioceses.[134]

The local Ordinary may dispense from the publication of the banns in the marriages of the faithful with publicly unworthy Catholics because of the danger of scandal. Since this danger is generally present in such marriages inasmuch as they are considered by the people to be somewhat similar to mixed marriages, the more prudent practice would seem to be the omission of the banns and the obtaining of the necessary dispensation. It is understood, of course, that the freedom of the parties to marry must be established in some other manner with moral certitude.

In mixed marriages the publication of the banns normally is forbidden, so that there is no need of a dispensation or of a record of it. However, the marriages of the faithful with publicly unworthy Catholics are not mixed marriages. Fundamentally, they are the marriages of two Catholics. Consequently, the law calls for the publication of the banns of marriage in such cases. But, though the law calls for a certain kind of procedure, it may yet be usually advisable, in the face of frequently incidental circumstances, to forego the demand which the law has set up. In such cases, the pastor or the assisting priest should petition the local Ordinary for the necessary dispensation from the publication of the banns. This petition should be distinct from the request for permission from the local Ordinary to assist at such a marriage. Similarly, the record of the granting of the dispensation from the banns should be filed separately. In this way there will be satisfactory assurance that the two distinct obligations have been attended to: (1) the procuring of the permission of the local Ordinary to assist at the marriage of a publicly unworthy

[134] Canon 1028.

Catholic;[135] and (2) the publishing of the banns or, in the event of their omission, the obtaining of the necessary dispensation.[136]

In practice, it will usually happen that the parties will mistakenly presume that their marriage will be considered as a mixed marriage. Knowing that the banns of matrimony are usually not announced for such marriages, they will conclude that such will be the procedure in their own case. As a result, they will make all other arrangements for the marriage to be celebrated at a date which does not allow sufficient time for the publication of the banns. This fact, added to the danger of scandal, will make it necessary that the proclamation of the banns be dispensed.

VII. The Place for the Celebration of the Marriage

Canon 1109, § 1, sets forth the general rule that marriages between Catholics should be celebrated in the parish church. Only with the permission either of the local Ordinary or of the pastor may it be celebrated in any other church or oratory, whether public or semi-public.

According to canon 1109, § 3, marriages between a Catholic and a non-Catholic should be celebrated outside of church, unless the local Ordinary prudently judges otherwise.

Since publicly unworthy Catholics are by no means non-Catholics, they are not subject to the prescriptions of canon 1109, § 3.[137] The marriages of the faithful with such Catholics should not be celebrated as mixed marriages, for example, in the parish rectory. They should be celebrated as the marriages of two Catholics in the parish *church* in accordance with the rule of canon 1109, § 1.

Canon 1109, § 2, grants the local Ordinary the power to permit the celebration of the marriages of Catholics in private

[135] Canons 1065; 1066.

[136] Canons 1022; 1028.

[137] Schmid, "De vi verborum 'acatholicus, secta acatholica, minister acatholicus' in Iure Canonico"—*Apollinaris,* (Romae, 1928—) V (1932), 72.

houses only in some extraordinary case and for a good reason. Such permission may be granted in the marriages of publicly unworthy Catholics. Sometimes the parties in such marriages will refuse to be married in the church, and will request permission to be married in the parish rectory. As Quigley[138] and Schenk[139] rightly observe, if the local Ordinary foresees that grave scandal will arise from the celebration of such marriages in the church itself, he may forbid the use of the church for this purpose and may grant the necessary permission for the marriage to be celebrated outside of church and in a suitable place, such as a private chapel or the parish rectory.[140]

VIII. The Sacred Rites in the Celebration of the Marriage

Canon 1100 states that, except in a case of necessity, marriage must be celebrated with the observance of the rites which are prescribed in the ritual books approved by the Church or are accepted by laudable custom. The rite of celebration as found in the Roman Ritual or in a diocesan ritual consists of certain ceremonies and prayers, the mutual exchange of marital consent, the blessing of the wedding ring, and the joining of hands by the parties.[141] In addition, canon 1101 urges that the pastor see to it that the spouses at some time receive the Solemn Nuptial Blessing, which can be given only during Mass.

Canon 1102, § 2, forbids all sacred rites in the celebration of mixed marriages. However, if the local Ordinary foresees that a greater serious harm will result from the enforcement of the prohibition than from its relaxation, he may permit

[138] *Condemned Societies,* p. 106.

[139] *The Matrimonial Impediments of Mixed Religion and Disparity of Cult,* p. 278 (n. 391).

[140] Cf. Dodwell, *The Time and Place for the Celebration of Marriage,* The Catholic University of America Canon Law Studies, n. 154 (Washington, D. C.: The Catholic University of America Press, 1942), pp. 107-109.

[141] *Rituale Romanum,* tit. VII, *De Sacramento Matrimonii,* c. 2, *Ritus Celebrandi Matrimonii Sacramentum.*

some of the usual ecclesiastical ceremonies, to the exception, however, of the Nuptial Mass, which ceremony is always forbidden in connection with the celebration of mixed marriages.

Canonists are not in agreement as to the use of the sacred rites in the celebration of the marriages of publicly unworthy Catholics. Some canonists maintain that the prescriptions of canon 1102, § 2, do not refer to such marriages. Since the Code does not either explicitly or implicitly prohibit the use of the sacred rites and the celebration of Mass, they consider this silence as an abrogation of such prohibitions in former decrees.[142]

Other canonists maintain that the pre-Code decrees may still be invoked as a norm, and thus they consider the use of the sacred rites, or at least the celebration of Mass, to be forbidden.[143]

It is true that the Code contains no explicit prohibition either of the celebration of Mass or of the use of the sacred rites for the marriages in question. However, canons 2260, § 1, and 2275, 2°, state that those whose excommunication or personal interdict is legally notorious, that is, by either a declaratory or a condemnatory sentence, cannot receive the sacramentals. Since the Nuptial Blessing, as an invocative blessing, is a sacramental, it must be denied in the marriages

[142] S. C. S. Off. (S. Bonifacii), 23 apr. 1873—*Fontes,* n. 1026; S. C. S. Off., instr. (ad Ordinarios Imperii Brasil.), 2 iul. 1878—*Fontes,* n. 1056. These two decrees prohibited unconditionally all ecclesiastical rites in the celebration of the marriages of *members of condemned societies.* However, a later decree of the Supreme Sacred Congregation of the Holy Office (Bombay, 21 febr. 1883—*Fontes,* n. 1079) allowed the celebration of Mass in such marriages when grave circumstances demanded it. A response of the Sacred Penitentiary on December 10, 1860 (*Fontes,* n. 6426) forbade the celebration of Mass in the marriages of Catholics who had notoriously incurred an ecclesiastical censure. Cf. Quigley, *Condemned Societies,* p. 106; Gougnard, *De Matrimonio,* p. 136; Vlaming, *Praelectiones Iuris Matrimonii,* n. 250; Cerato, *Matrimonium,* n. 59; Farrugia, *De Matrimonio,* n. 140; Wernz-Vidal, *Ius Canonicum,* V, nn. 201, 203, 557, who, however, maintain that the Nuptial Blessing should be denied in the marriages of Catholics who are excommunicated or interdicted.

[143] Cappello, *De Sacramentis,* III, n. 332; Chelodi, *Ius Matrimoniale,* n. 67; Augustine, *A Commentary,* V, 157.

of those who are so censured.[144] Further, if either party is excommunicated, the public prayers and the Sacrifice of the Nuptial Mass seem to be forbidden by canon 2262, § 1.

Because of these implicit prohibitions in the Code and because of the scandal which would be occasioned if such marriages were to receive the solemn official blessing of the Church, Schenk supports the opinion of the second group of canonists who have been cited on this point.[145] He concludes quite properly that the decisions which antedate the Code seem to continue in force at least as a norm, and that *ordinarily* the use of the sacred rites and the celebration of Mass are prohibited, unless the Ordinary sees fit, because of grave circumstances, to permit some or all the sacred rites, including even the celebration of Mass. This opinion is supported also by Payen[146] and Dodwell.[147]

It should be noted that this prohibition is not based on the law of canon 1102, § 2, which prescribes a rule solely for mixed marriages. The marriages of publicly unworthy Catholics are fundamentally the marriages of two Catholics, and normally should be regulated by canons 1100 and 1101 in this matter. The restrictions on the use of the sacred rites in such marriages is based on the divine natural law which necessitates the avoidance of scandal.

In practice, it seems that in such marriages the local Ordinary may well permit, as a general rule, the use of those sacred rites which are ordinarily obligatory in the celebration of Catholic marriages, excluding only the Nuptial Mass and the Solemn Blessing. Thereby there will be impressed on the unworthy Catholic the fact of his fundamental Catholicity, with the reasonable hope that he may be induced to return to the

[144] Cf. canon 1144; Wernz-Vidal, *op. cit.*, V, n. 557; Hyland, *Excommunication*, pp. 78-80; Schenk, *op. cit.*, p. 277; Conran, *The Interdict*, pp. 110-112.

[145] *Op. cit.*, pp. 277-278.

[146] *De Matrimonio*, I, n. 927.

[147] *The Time and Place for the Celebration of Marriage*, pp. 78-79.

practice of his religion. Wherever a marriage ceremony without the Nuptial Mass is the customary procedure in the celebration of the greater number of Catholic marriages in a particular community, the local Ordinary may well decree that all the usual, external non-liturgical pomp and display of ceremony must be eliminated in the marriages of publicly unworthy Catholics.

As practical conclusions of the foregoing study, it should be realized that these marriages must not be confused with *mixed marriages*. Moreover, they should not be included in the number of mixed marriages in the Quinquennial Report to the Holy See. Further, the permissions granted for them should not be included in the Annual Report to the Holy See concerning the number of dispensations granted by virtue of the Quinquennial Faculties. Finally, the Chancery search of files for evidence of convalidation of attempted marriages should extend to the files of *permissions* granted in accordance with canons 1065-1066.

JOHN J. HENEGHAN.

BROOKLYN, N. Y.

"The use of a public school building for Sabbath schools, religious meetings .... which, of necessity, must be occasional and temporary, is not so palpably a violation of the fundamental law as to justify the courts in interfering.... Such occasional use does not convert the schoolhouse into a building of worship, within the meaning of the Constitution"—Davis v. Boget (1878), 50 Iowa 11, 15, 16.

Cases and Studies

NONAGE MARRIAGE OF A PROSPECTIVE CONVERT

A couple is taking instructions with a view to entering the Church. The parties of this union have lived together happily for some years, but the man has been married previously. He contracted the earlier union in 1916, when he was but 16 years of age and the girl was 17. About three weeks later the young man joined the army. While he was away his father obtained a declaration of nullity from the civil court. The sentence stated: "It is therefore adjudged and decreed by this court that the marriage of the plaintiff, ————, to the defendant be and the same is hereby declared null and void." The man accordingly entered the second union in good faith.

Since the woman of the first union received baptism in 1921, and the man in 1922, the use of the Pauline privilege is manifestly excluded as a means whereby the man could gain freedom for the contracting of a second union. But is there excluded also the application of the *privilegium fidei*, as illustrated through the principle enunciated in canon 1127? Or could the civil declaration of nullity relative to the first union be accepted as furnishing sufficient ground for considering the present (second) union as valid, once both parties have been received into the Church?

OFFICIALIS

Can. 1014.—Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur, salvo praescripto can. 1127.

Can. 1069.—§ 1. Invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quamquam non consummati, salvo privilegio fidei.

§ 2. Quamvis prius matrimonium sit irritum aut solutum quilibet ex causa, non ideo licet aliud contrahere, antequam de prioris nullitate aut solutione legitime et certo constiterit.

Can. 1127.—In re dubia privilegium fidei gaudet favore iuris.

S. C. S. Off., decr. die 18 ian. 1928: Dub. I. Utrum in causis matrimonialibus *acatholicus*, sive baptizatus sive non baptizatus, *actoris* partes agere possit. Ad I. Siquidem autem speciales occurrant rationes ad admittendos acatholicos ut *actores* in huiusmodi causis, recurrendum ad Supremam Sacram Congregationem Sancti Officii in singulis casibus.—*AAS*, XX (1928), 75.

S. C. S. Off., decr. die 15 mart. 1939: Dub. I. Utrum decisio Supremae S. Congregationis S. Officii data 18 Ianuarii 1928 ad I., qua nempe declaratum fuit acatholicos in causis matrimonialibus actoris partes agere non posse, spectet tantum Tribunal S. Romanae Rotae, an etiam Tribunalia dioecesana. Ad I. *Negative* ad primam partem; *affirmative* ad alteram, seu: spectare etiam Tribunalia dioecesana. Dub. II. Utrum Promotor Iustitiae, vi canonis 1971, nulla praehabita facultate a S. Officio, matrimonium accusare possit si nullitas matrimonii fuerit denuntiata a coniuge acatholico. Ad II.: *Negative*, nisi publicum bonum, Ordinarii iudicio, id postulet.—*AAS*, XXXI (1939), 131.

Pont. Comm. Intr., die 12 mart. 1929: Dub. Utrum vox *impedimenti* canonis 1971, § 1, n. 1, intelligenda sit tantum de impedimentis proprie dictis (cann. 1067—1080), an etiam de impedimentis improprie dictis matrimonium dirimentibus (cann. 1081—1103). Resp. *Negative* ad primam partem, *affirmative* ad secundam.—*AAS*, XXI (1929), 171.

Pont. Comm. Intr., die 17 iul. 1933: Dub. ad II. An, ad normam canonis 1971, § 1, n. 1, habilis sit ad accusandum matrimonium etiam coniux, qui fuerit causa culpabilis sive impedimenti sive nullitatis matrimonii. Resp. ad II: *Negative.*

S. C. de Sacr., instr. 15 aug. 1936, art. 37, § 1: Coniux inhabilis est ad accusandum matrimonium, si fuit ipse causa culpabilis sive impedimenti sive nullitatis matrimonii.

Pont. Comm. Intr., die 27 iul. 1942: Dub. Utrum secundum canonem 1971, § 1. n. 1, et responsum diei 17 iulii 1933 ad II, inhabilis ad accusandum matrimonium habendus sit tantum coniux, qui sive impedimenti sive nullitatis matrimonii causa fuit et directa et dolosa an etiam coniux qui impedimenti vel nullitatis matrimonii causa exstitit vel indirecta vel doli expers. Resp. *Affirmative* ad primam partem; *negative* ad secundam.—*AAS*, XXXIV (1942), 241.

Pont. Comm. Intr., die 17 febr. 1930: Dub. An coniuges qui, iuxta canonem 1971, § 1, n. 1, et interpretationem diei 12 mart. 1929, habiles non sunt ad accusandum matrimonium, vi eiusdem canonis § 2 ius saltem habeant nullitatem matrimonii Ordinario vel promotori iustitiae denuntiandi. Resp. *Affirmative.*—*AAS*, XXII (1930), 196.

Pont. Comm. Intr., die 6 dec. 1943: Dub. An coniuges inhabiles ad accusandum matrimonium qui, iuxta canonem 1971, § 2, et inter-

pretationem diei 17 Februarii 1930, ius exercere velint denuntiandi nullitatem matrimonii, teneantur adire Ordinarium vel promotorem iustitiae tribunalis competentis, ad videndum de causa nullitatis sui matrimonii ad normam canonis 1964, an possint etiam adire alium Ordinarium vel alium promotorem iustitiae. Resp. *Affirmative* ad primam partem, *negative* ad secundam.—*AAS*, XXXVI (1944), 94.

The canons and documents here quoted furnish the basis for the answer to the submitted query. When the Church renders judgment regarding the invalidity or validity of a marriage in which it has competence to proceed, that judgment must be rendered upon the Church's own proper investigation of the merits in the case. A declaration of nullity cannot ensue simply in consequence of the previously rendered judgment of a civil court. It therefore becomes imperative for the Church to weigh the submitted testimony and to evaluate its conclusiveness in the light of the law by which the couple was ruled in the contraction of the marriage. If that law was applicable inasmuch as it was in full accord with the dictates of the natural law itself, then the compliance with or the deviation from the requirements of that law will determine respectively the validity or the invalidity of the marriage in the event that the law set up a condition requisite for the validity of the matrimonial contract.

In the proposed case neither the non-Catholic man nor the non-Catholic woman of the second union is qualified personally to impugn the validity of the earlier union of the man. And according to the decree of the Holy Office, as issued on March 15, 1939, the diocesan promoter of justice likewise lacks the capacity of impugning the validity of the earlier union upon the non-Catholic party's denouncement of it, unless in the judgment of the diocesan ordinary the public good should demand that he do so. The case as proposed does not offer any warrant for assuming as present the consideration of the public good. Hence a special permission for the introduction of the case for a judicial hearing is indicated in the circumstances.

Inasmuch as there still remains some doubt whether the ecclesiastical sentence will be in accord with the civil sentence of nullity, it may well be that the man's freedom for the second union can be established solely through an application of the principle sanctioned in canon 1127. In the light of whatever doubt remains, and in

view of the fact that the Holy See alone can set aside a non-consummated sacramental union to pave the way for the contraction of a marriage which favors the new-found faith of at least one of the contracting parties, it appears quite reasonable to associate with the request which is submitted to the Holy Office for opening the hearing of the case the further petition for the use of the *privilegium fidei* upon the reception of the parties of the present union into the Church. Thus there may eventuate a grant which may leave unnecessary the judicial hearing of the case, or, if that hearing be called for, will then upon negative results invoke the *privilegium fidei* as the ultimate means to insure the freedom for the parties to validate their present union.

CLEMENT BASTNAGEL

THE CATHOLIC UNIVERSITY OF AMERICA

TESTIMONY IN SUMMARY CASES

In General:

What is essential for the validity of the process in informal trials according to Canon 1990?

In Particular:

1. Must the parties be cited to appear before the Bishop, Defensor Vinculi, and Notary and must the parties be examined before these three, or is it sufficient if the parties are examined by the Bishop alone?
2. If the parties to be examined are far removed from the episcopal see, would it be sufficient if they appeared before two priests, one appointed to act as Auditor, the other appointed to act as Notary, for the particular case or must a Defensor Vinculi be appointed also?
3. Are there any circumstances in which it is sufficient to appoint only one priest to cite and examine the parties?
4. Must the Bishop cite the parties himself or may be delegate any pastor or assistant to do it?
5. May the Bishop validly give general delegation to e.g. a Notary (*ad universitatem causarum*) to appoint a priest to cite and examine the parties?
6. Would the process be valid if the Bishop after the Defensor Vinculi had seen the evidence, passed the sentence without observing any other formalities?

   Could a party be considered as cited if he made an affidavit before a priest (a) who was authorized by the Bishop (b) who was not authorized by the Bishop?
7. What is necessary for validity in taking the testimony of witnesses in such cases?

PRACTICUS

S. C. de Sacr., instr. die 15 aug. 1936, Art. 226: Quoties agatur de casu excepto ad normam canonis 1990, officialis, auditis coniugibus, si comparuerint, et perpensis rebus, videat an de impedimenti existentia seu de nullitatis causa ex certo et authentico documento quod nulli contradictioni vel exceptioni obnoxium sit, constet. De quo si sibi videatur constare, necnon pari certitudine vel alio legitimo modo (Comm. Pont. 16 Iunii 1931, ad I) appareat dispensationem concessam non fuisse, rem Ordinario deferat.

Art. 227.—§ 1. Ordinarius, iudicem agens, citatis semper partibus iisque auditis, voto etiam exquisito defensoris vinculi necnon promotoris iustitiae, si iste matrimonium accusaverit vel ipsum Ordinarius audire censuerit, potest iuxta suum prudens iudicium matrimonii nullitatem sententia declarare, rationibus breviter adductis in iure et in facto.

§ 2. Quod si Ordinarius iudicaverit non omnia concurrere quae requiruntur vi canonis 1990, ut de nullitate matrimonii tamquam de casu excepto ipse agere queat, causam remittat ad tribunal dioecesanum, quod per viam ordinariam procedat, ad normam Tituli V et seqq.

Art. 228.—Ordinario absente aut impedito, sententia, de qua in articulo praecedenti, datur ab officiali de mandato speciali Ordinarii.—*AAS*, XXVIII, (1936), 358.

Art. 231.—§ 1. Si quis certo tenebatur ad canonicam formam celebrationis matrimonii, et tantum civile matrimonium contraxit, vel coram ministro acatholico matrimonium inivit, aut si apostatae a fide catholica in apostasia civiliter vel ritu alieno se iunxerunt, ad hoc ut constet de horum stato libero, neque iudiciales solemnitates requiruntur, neque interventus defensoris vinculi: sed hi casus solvendi sunt ab Ordinario ipso, vel a parocho, consulto Ordinario, in praevia investigatione ad matrimonii celebrationem, de qua in canone 1019 et seqq.

§ 2. Si quod dubium supersit de recensitis conditionibus in § 1, quaestio ordinarii processus tramite definienda est.

Pont. Comm. Intr., die 16 iun, 1931, ad IV: Dub. I. Utrum *par certitudo*, de qua in canone 1990, haberi possit tantum ex certo et authentico documento, an etiam ex alio legitimo modo. Dub. II. Utrum *citatio partium*, de qua in canone 1990, facienda sit ante declarationem nullitatis matrimonii. Resp. ad I: *Negative* ad primam partem, *affirmative* ad secundam. Ad. II: *Affirmative.—AAS*, XXIII (1931), 353-354.

Comm. Pont. Intr., die 6 dec. 1943: I.—De denuntiatione nullitatis matrimonii. Dub. An coniuges inhabiles ad accusandum matrimonium qui, iuxta canonem 1971, § 2, et interpretationem diei 17 Februarii 1930, ius exercere velint denuntiandi nullitatem matrimonii, teneantur adire Ordinarium vel promotorem iustitiae tribunalis competentis ad videndum de causa nullitatis sui matrimonii ad normam canonis 1964, an possint adire alium Ordinarium vel alium promotorem iustitiae. Resp. *Affirmative* ad primam partem, *negative* ad secundam.

II.—De declaratione nullitatis matrimonii. Dub. I. Utrum *casus excepti* canonis 1990 sint taxative an demonstrative enunciati.

Dub. II. Utrum processus, de quo in canone 1990, sit ordinis iudicialis, an administrativi.

Dub. III. An nomine *Ordinarii,* de quo in canone 1990, veniat Vicarius generalis, saltem de speciali mandato Episcopi.

Dub. IV. Utrum sub verbis: *iudex secundae instantiae,* de quibus in canonibus 1991 et 1992, veniat tantum Episcopus, an etiam Officialis.

Resp. Ad I et II. *Affirmative* ad primam partem, *negative* ad secundam.

Ad III. *Negative.*

Ad IV. *Negative* ad primam partem, *affirmative* ad *secundam.*—*AAS,* XXXVI (1944), 94.

S. C. de Sacr., instr., die 15 aug. 1936: Art. 3, § 2.—Ordinarii nomine non veniant in hac Instructione neque Vicarius Generalis, quando agitur de ponendis actis iudicialibus (cfr. can. 1573, § 2), neque Superiores religiosi.—*AAS,* XXVIII (1936), 315.

Art. 74.—§ 1. Libello vel orali petitione admissa, locus est vocationi in ius seu citationi alterius partis (can. 1711, § 1) nec defensoris vinculi ad litem contestandam: quae, instante actore, vel etiam *ex officio,* fieri potest.

§ 3. Citatio debet etiam actori denunciari ut, statuta die et hora, ipse quoque coram iudice se sistat (cfr. can. 1712, § 3).

§ 4. Si reus vel actor procuratorem legitime constituerit, ad normam art. 44, § 1, citatio procuratori fieri potest; itidem et advocato qui, procuratoris defectu, eius impleat partes.

Art. 75. Si causa instituatur agente *ex officio* promotore iustitae, ambo coniuges citandi sunt.—*AAS,* XXVIII (1936), 330.

Can. 1585.—§ 1. Cuilibet processui interesse oportet notarium, qui actuarii officio fungatur; adeo ut nulla habeantur acta, si actuarii manu non fuerint exarata, vel saltem ab eo subscripta.

§ 2. Quare iudex, antequam causam cognoscere incipiat, in actuarium assumere debet unum e notariis legitime constitutis, nisi ipse Ordinarius aliquem pro ea causa iam designaverit.

Can. 1715.—§ 1. Citatio denuntietur per schedam, quae praeceptum iudicis parti conventae factum ad comparendum exprimat, idest a quo iudice, ob quam causam saltem verbis generalibus indicatam, quo actore, reus, nomine et cognomine rite designatus, conveniatur; nec non locum, et tempus, idest annum, mensem, diem et horam ad comparendum praefixum perspicue indicet.

§ 2. Citatio, sigillo tribunalis munita, subscribenda est a iudice vel ab eius auditore et a notario.

Can. 1716.—Citatio duplici scheda conficiatur, quarum altera remittatur reo convento, altera asservetur in actis.

Can. 1723.—Si scheda citatoria non referat quae in can. 1715 praescribuntur aut non fuerit legitime intimata, nullius momenti sunt tum citatio tum acta processus.

Can. 1894.—Sententia vitio sanabilis nullitatis laborat, quando:

1°. Legitima defuit citatio;

2°. Motivis seu rationibus decidendi est destituta, salvo praescripto can. 1605;

3°. Subscriptionibus caret iure praescriptis;

4°. Non refert indicationem anni, mensis, diei et loci quo prolata fuit.

In General.

For the validity of the process in informal trials there must be compliance with all the *essential* demands which are inherent in the conduct of a judicial trial. Since the official pronouncement of the Pontifical Commission for the Interpretation of the Code, namely on December 6, 1943, it is unmistakably evident that also the simplified procedure which canons 1990 ff. call for is of a judicial order, and therefore must follow the rules which exist as essential or procedural requisites for the validity of the eventual sentence rendered by the competent judge.

In Particular.

1. Article 227, § 1, of the 1936 Instruction, as above quoted, points to the Ordinary as the acting judge for the citation and hear-

ing of the parties. There is no specific indication in this article that the defender of the bond must be present at the hearing of the parties, but the sentence of the judge is to follow only " voto etiam exquisito defensoris vinculi," or upon the previous intervention of the defender of the bond, as canon 1990 indicates. Accordingly it seems sufficient to have the defender of the bond review the testimony of the case. This will enable him to decide whether there is reason to appeal the sentence for a second hearing in line with his duty to do so whenever he prudently deems that the existence of the impediment is not certain, or that probably a dispensation was previously obtained.

Canon 1585 plainly calls for the notary's subscription to the acts of the case if these are to be recognized as validly operative and effective. But to be able to subscribe his name to the acts in a reasonably responsible manner it is to be assumed that the notary personally vouch for the correct transcription of the acts. While it is not necessary that he personally draw up the acts, yet he must affix his signature in confirmation of the accurate recording of the testimony as made. This latter consideration points to the necessity of his presence at the hearing of the testimony, for under that supposition alone can he be held responsible for what is implied by the affixing of his signature. Correspondingly it seems that a bishop may not rest satisfied to hear the parties simply in his own presence, and then have the notary draw up the acts as later dictated by the bishop. To do so would, to say the least, imply an inequitable demand upon the notary who by affixing his signature is held accountable with a primary responsibility for the correctness and accuracy of the recorded acts.

2. In line with the previous statement under n. 1, it does not seem necessary to appoint a defender of the bond who along with the auditor and the notary is actually present at the hearing of the parties. In this instance, as in the previous one wherein the bishop himself hears the testimony, the defender of the bond can review the acts and take action accordingly, either to appeal the case if the testimony seems deficiently conclusive, or to forego the making of an appeal if the testimony appears satisfactorily conclusive. And, if because of his absence or for some other hindrance the bishop can commit even the judgment in the case to the *officialis,* then *a fortiori* the bishop can appoint an auditor for the col-

lecting and hearing of the testimony which simply forms the basis for the bishop's own judicial sentence.

3. Since the simplified procedure demanded by canons 1990 ff. is nevertheless a judicial procedure, and since in the light of this the presence of a notary as distinct from the auditor or judge appears necessary, it seems insufficient to have the case heard in the presence of simply the auditor, just as it seems not to suffice to have the bishop alone hear the parties in the absence of a notary whose name is to be affixed as a signature to the acts.

4. The citation of the parties is a matter which may be rightfully undertaken by the auditor when he is properly authorized. Hence it seems altogether allowable to let the bishop appoint a pastor or an assistant pastor to to function in the capacity of an auditor along with someone else to act as notary. The testimony of the parties and the documents furnished by them in a case will form the acts of the case which the bishop can then review personally for reaching his judgment concerning the alleged invalidity of the marriage.

5. The power which the bishop has in hearing the cases listed in canon 1990 is such that he can delegate others to do so. If in his act of delegation he sanctions also the power of subdelegation, then the latter is not excluded. Similarly, if the notary himself has a general delegation to hear the cases, then he can individually subdelegate that power to others and thereupon personally function in his capacity of notary.

Or, perhaps the bishop has intended in a general way to let the notary be his authorized agent and to act as his responsible mouthpiece in the designation of the one who is to function as the auditor in any particular case as it comes up to claim attention and to demand a hearing. While this method of procedure seems not to be directly contemplated by the legislator, yet one would scarcely have a sound juridical basis on which to rule it out as altogether inapplicable and ineffective in its intended aim. Still, it seems much more satisfactory and in closer keeping with the general rules on judicial procedure for the bishop to authorize a particular priest as auditor whenever the need or the occasion arises. Then a better suited designation can be made in accordance with the specific attention that the individual case may call for.

6. The bishop can indeed pass sentence when the defender of the bond has been given his opportunity and accordingly has reviewed

the evidence. But it seems essential for the bishop to draw up the sentence in writing, with a brief indication in law and in fact of the basis which underlies the declaration of his sentence.

If a priest is properly authorized to act as auditor in a case, then it is also implied that he can and properly does cite the parties for the hearing of the case. The ultimate judgment or sentence will of course remain with the bishop, or with the *officialis* if he has been called on by special mandate of the bishop to render the sentence in view of some hindrance which impedes personal action on the part of the bishop. Testimony which an authorized priest may have collected on his own responsibility or initiative does not seem sufficient, even when it is given before a civil notary public, for the testimony which forms the basis for the eventual sentence must be a *judicial* testimony. But the testimony was not given upon any judicial summons, nor was it given in court procedure in consequence of the parties' appearance before the priest or before a civil notary. Hence the issuing of a citation still seems necessary along with the subsequent restatement of that testimony if the testimony is to furnish a proper basis for the bishop's sentence.

7. The taking of the testimony of the witnesses must proceed in the same fashion in which it proceeds in the ordinary judicial cases. It is to be remembered that a *reliable* and *creditable* testimony alone can beget the "*par certitudo*" which more normally is derived through documentary evidence. Until the bishop can have an adequate assurance that the testimony has an equally conclusive value with the certainty which public documents furnish, he can not proceed in the simplified manner which is sanctioned in canons 1990 ff. If he did, the defender of the bond would invariably have to appeal from his sentence. That appeal, in turn, could readily effect the remittal of the case from the court of second instance with the corresponding demand that the case be tried in a fully formal judicial procedure. In fact, if the bishop's sentence must rely upon testimony rather than documents, there may be the need of added safeguards in the hearing of the witnesses, since otherwise the manifestly conclusive certainty which is requisite for a sentence might be wanting, and thus the adaptability of the simplified procedure might be completely frustrated.

CLEMENT BASTNAGEL

THE CATHOLIC UNIVERSITY OF AMERICA

SEMINARIAN CHANGING DOMICILE.

Titius, a seminarian born and domiciled in diocese A has completed in the seminary of that diocese the preparatory course. At the time he was about to enter the major seminary in diocese X to continue his studies, his parents moved to diocese B where they established their domicile. Titius, having always desired to be a priest of diocese A, announces this again at the time of his call to receive Tonsure. Both Ordinaries are willing that he should belong to diocese A. How can Titius be ordained for that diocese?

In this case Titius is in a seminary in diocese X, so it is not likely that either the Bishop of diocese A or the Bishop of diocese B will actually confer Tonsure on Titius. Dimissorial letters will more probably issue that the Bishop of diocese X may confer it. These dimissorials will have to issue from the Curia of Titius' "*Episcopus proprius.*"[1] Since Titius is a secular, destined to be a priest of diocese A, and since he is still a minor, the domicile of whose parents has thus affected him, the "*Episcopus proprius*" in his case is the Bishop of diocese B, in which through his parents he now has his domicile.[2] Titius is a secular who has now in diocese B his simple domicile without origin. It will not be necessary for him to give an oath that he will remain in diocese B, of course, since it is intended that he shall belong to diocese A; and if the first method of transfer outlined below is followed it may well be that he will not have to give an oath that he will remain in diocese A, his diocese of origin in which he intends to re-acquire a domicile of his own.

As to the manner of ordaining Titius for diocese A, this can be done either by giving him Tonsure for diocese A, the dimissorials of the Bishop of B expressly so providing, and the Bishop of A ex-

[1] Can. 955, § 1, "Unusquisque a proprio Episcopo ordinetur aut cum legitimus eiusdem litteris dimissoriis."

[2] Can. 956, "Episcopus proprius, quod attinet ad ordinationem saecularium, est tantum Episcopus dioecesis in qua promovendus habeat domicilium una cum origine aut simplex domicilium sine origine; sed in hoc altero casu promovendus debet animum in dioecesi perpetuo manendi iureiurando firmare, nisi agatur de promovendo ad ordines clerico qui dioecesi per primam tonsuram iam incardinatus est, vel de promovendo alumno, qui servitio alius dioecesis destinatur ad normam can. 969, § 2 . . ."

Maroto (*Apollinaris*, V [1932], 245) indicates that incardination of itself does not produce a domicile (cf. Can. 92, § 1). The response of C.I.C. of July 24,

pressly consenting,[3] or by giving him Tonsure for diocese B and then making a formal act of excardination of Titius from diocese B followed by a formal act of incardination of Titius in diocese A.[4] The method first mentioned is, of course, the more simple.

Dimissorials for further orders will be given by the Bishop of diocese A to which Titius will belong when the procedure of transfer is complete.[5] It is submitted that care should be exercised to make certain that the consent of both Ordinaries to the transfer is expressed, either at the time of the giving of Tonsure for diocese A, or at the time of formal excardination-incardination, to avoid the possibility of complications in the granting of further dimissorials for subsequent orders. The transfer is not complete until the incardination takes place,[6] hence, until that time it would seem that the Bishop of B is still the "*Episcopus proprius*" and, as a consequence, the only one who can properly ordain Titius or grant dimissorials for his ordination until such time as he has been properly transferred to the jurisdiction of the Bishop of A. It is even pos-

1939, to Dubium II; quoted in footnote 5 *infra*, does not contradict this view; it may even be considered as confirmatory of it. Titius will, then, when he reaches his majority, acquire (or re-acquire) his domicile in diocese A when he returns to labor there. It is to this that his oath of remaining permanently in the diocese binds him.

[3] C. I. C. 24 July, 1939, "Dubium I—An laicus, qui a proprio Episcopo ad primam tonsuram promotus sit in servitium alius determinatae dioecesis de consensu huius Episcopi, huic dioecesi incardinatus sit ad normam canonis 111, § 2.

Resp. Affirmative.—AAS, XXXI (1939), 321.

[4] Can. 969, § 2, "Non prohibetur tamen Episcopus proprium promovere subditum, qui in futurum, praevia legitima excardinatione et incardinatione, servitio alius dioecesis destinetur."

[5] C. I. C., 24 July, 1939, "Dubium II—An Episcopus dioecesis, in cuius servitium laicus ad primam tonsuram a proprio Episcopo promotus fuerit, illi iure proprio et exclusivo ordines conferre aut litteras dimissorias dare valeat ad normam canonis 955, § 1, licet ipse in eadem dioecesi domicilium nondum acquisiverit.

Resp. Affirmative.—AAS, XXXI (1939), 321.

[6] Can. 110, "Excardinatio fieri nequit sine iustis causis, et effectum non sortitur, nisi incardinatione secuta in alia dioecesi, cuius Ordinarius de eadem priorem Ordinarium quantocius certiorem reddat."

sible that a false assumption of authority to ordain Titius or grant him dimissorials might bring on a suspension.[7]

In practice it may be advisable for the Curia releasing Titius to put into its documents a paragraph similar to the following:

Cum Nobis constet te velle teipsum mancipare servitio dioeceseos N., cui voto Rev.mus eiusdem dioeceseos Ordinarius benevolenter assentit uti Nobis significavit litteris datis die. . . . . ; libenter concedimus facultatem, tamquam Ordinarius tuus proprius, Tonsuram primam accipiendi ab Episcopo. . . . . Quo facto, scias te in eamdem dioecesim N. incardinatum ad normam can. 111, § 2, vel, si magis ad normam can. 969, § 2 procedere expediat, hisce iisdem litteris, recepta prima Tonsura, ipso facto et sine necessitate iterum ad Nos recurrendi, a dioecesi Nostra N. absolute et in perpetuum te excardinamus et excardinatum declaramus in eum finem dumtaxat ut dioecesi N. adscribi valeas, et immediate incardinari queas.

If the incardination is intended to take place in virtue of Canon 111, § 2, the letter from the Bishop who receives Titius will be sent to the Bishop who releases him *before* the above-mentioned letter is issued by the latter; if it is to take place in virtue of Canon 969, § 2, the letter from the Bishop who receives the candidate for Orders will be sent to the Bishop who releases him *after* the document of incardination in the usual form has been made out and will inform the Bishop releasing Titius that the incardination has taken place.

THOMAS OWEN MARTIN

THE CATHOLIC UNIVERSITY OF AMERICA

[7] Can. 2373, "In suspensionem per annum ab ordinum collatione Sedi Apostolicae reservatam ipso facto incurrunt: 1° Qui contra praescriptum can. 955, alienum subditum sine Ordinarii proprii litteris dimissoriis ordinaverint."

Decrees and Decisions

CANONICAL

ALLOCUTION OF POPE PIUS XII TO THE SACRED ROMAN ROTA

The Unique Purpose of the Adjudication of Matrimonial Processes

In previous years the inauguration of the new juridical year of the Sacred Roman Rota gave us the opportunity to emphasize certain special points in the instruction of marriage cases, and to show in what way the Church, in accordance with her mission and her character, regards and considers such points, and how she wishes those points to be viewed and treated by the Judge and members of the Ecclesiastical Tribunals.

In the past we spoke of the natural right to marriage and the psychical and physical inability to contract marriage. Likewise did we speak of certain fundamental principles concerning the declaration of nullity of marriage and the dissolution of the validly contracted bond. We then set forth various reflections on the certainty required to enable the Judge to proceed to the pronouncement of his sentence, and we observed that moral certainty was sufficient, that is, the certainty which excludes all reasonable doubt concerning the truth of the fact, bearing in mind, moreover, that it must possess an objective character and is not to be based solely on the merely subjective opinion or attitude of the Judge.

With the same intent of expressing the spirit and the will of the Church, which for the good of Christians and the sanctity of the family, attributes a supreme importance to matrimony, we propose today—after having heard the complete and accurate annual report of your worthy and esteemed Dean—to say a few words about the unity of purpose which must give a special form to the work and the collaboration of all those who participate in the instruction of marriage cases in Ecclesiastical Tribunals of every instance and

* Delivered October 2, 1944—*AAS*, XXXVI (1944), 281. Translation offered through the courtesy of the Archdiocesan Tribunal of the Archdiocese of New York.

type, that unity of purpose which must inspire and unite them in the same unity of aim and action.

The Threefold Element of Unity of Action

1. In general, we must accept the premise that unity of human action results and proceeds from the following elements: a single purpose, a common effort on the part of all directed towards this purpose, a juridical moral obligation to adopt and maintain such an effort. You well understand that the sole purpose of these elements constitutes the beginning and the formal end from the objective as well as from the subjective point of view. Just as every motion receives its determination from the end towards which it tends so also conscious human activity is determined by the purpose which it aims to achieve.

Now the sole purpose in the matrimonial process is a judgment conforming to truth and law, either concerning the alleged non-existence of the conjugal bond in the process of nullity, or the existence or non-existence of the conditions necessary for the dissolution of the bond in the informative process " de vinculo solvendo." In other words, the end is to ascertain the truth authoritatively and to enforce its corresponding law in relation to the existence or the continuance of a matrimonial bond. The personal objective is obtained through the will of the individuals who participate in the instruction of the case insofar as they direct and subordinate to the attainment of that end their every thought, will and act regarding the matter of the process. Therefore, if all the participants follow unswervingly this purpose their unity of action and of cooperation will follow as a natural result.

Finally, the third element, or the juridical moral obligation of maintaining such a purpose arises from the Divine Law in the matrimonial process. In fact the marriage contract is, by its very nature, and by its elevation to the dignity of a Sacrament for baptized souls, ordained and determined not by the human will, but by God. Suffice it to recall the words of Christ: " What therefore God has joined together, let no man put asunder " [2] and the teaching of St. Paul: " This is a great mystery—I mean in reference to Christ and to the Church." [3] The severe gravity of this obligation, arising from

[1] St. Thomas, 1ª, 2ªe, q. 1, Art. 2.

[2] Matt. 19, 6 (Confraternity Revision—1941 Edition).

[3] Eph. 5, 32 (Confraternity Revision—1941 Edition).

the Divine Law as from an ultimate supreme and unextinguishable font, must always be vigorously upheld and inculcated in a matrimonial process in the service of truth. May it never happen that in the matrimonial cases before Ecclesiastical Tribunals, there should ever be found deceptions, perjuries, subornations or frauds of any kind! Therefore, all those who participate in any way in these processes must keep a watchful eye, and if necessary must stimulate and reanimate their conscience, always mindful that in truth these processes are being conducted not in the Tribunals of men, but in the Tribunal of the all-knowing God, and that consequently the judgments rendered, have no value before God and in the realm of conscience, if some substantial fraud render them false.

The Unity of Purpose and of Action in the Individuals Participating in Marriage cases.

2. Unity and collaboration in marriage cases are therefore effected through unity of purpose, effort towards that end and the obligation of subordination to that end. This threefold element imposes on the individual actions of those participating in marriage cases certain essential demands, and impresses on this action a very special mark.

A. The Judge

(a) First of all, with regard to the Judge, who is to be likened to the animation of justice (justice personified), whose work reaches its apex (culmination) in the issuing of the sentence. The sentence ascertains and juridically determines the truth and gives it legal value in regard both to what concerns the adjudged fact as well as the application of the law to the case. But it is precisely toward this clarification and triumph of truth that the entire process is directed, as toward its proper end. Therefore, in this objective marshaling of the process toward its proper end, the judge finds also a safe directive norm for every personal investigation, judgment, prescription or prohibition which accompanies the unfolding of the process. Here appears the juridical moral obligation binding the Judge; the obligation arising from Divine Law; the obligation to seek and determine according to the truth whether a bond which has been sealed by all external signs really exists, or (in the case of dissolution) whether there exist the prerequisites necessary for the dissolution of the bond. Having established the truth, it is the

Judge's obligation to pronounce sentence in conformity with the truth. In this rests the supreme importance and the personal responsibility of the Judge in the direction and the conclusion of the process.

B. The Defender of the Bond

(b) It is the competency of the Defender of the Bond to uphold the existence or the continuance of the marriage bond. This, however, is not to be effected in an absolute way but subordinately to the purpose of the process which is the search and the ascertainment of the objective truth.

The Defender of the Bond must cooperate towards the common end insofar as he investigates, presents and clarifies all that can be adduced in favor of the bond. To enable the Defender of the Bond, who is to be considered as "Pars necessaria ad indicii validitatem et integritatem"[4] efficaciously to fulfill the duties of his office, procedural law has given him special rights and has assigned to him definite duties. And just as it would not be compatible with the importance of his office and with the vigilant and faithful fulfillment of his duty if he were to be content with a summary scrutiny of the acts and certain superficial observations; so it is likewise not proper that this office be entrusted to those lacking in experience of life and mature judgment.[5] This rule, however, does not do away with the fact that the observations of the Defender of the Bond are to be under the supervision of the Judges, for the Judges must find in the Defender's accurate exposition an aid and a complement to their own work; nor is it to be expected that the Judges always repeat all the work and all the investigations of the Defender in order that they might place trust in his exposition of the case.

On the other hand, it cannot be demanded of the Defender of the Bond that he draw up a defense at any cost, an artificial defense without care as to whether or not his statements have a solid foundation. Such a demand would be contrary to right reason. It would burden the Defender of the Bond with a useless, worthless task. It would contribute no clarification, but rather a

[4] Benedictus XIV, const. "*Dei miseratione*," 3 nov. 1741, § 7—*Fontes*, n. 318.

[5] Cf. Normae S. R. Rotae Trib., 22 iun. 1934, art. 4, § 2—*AAS*, XXVI (1934), 449-492.

confusion of the question. It would harmfully prolong the process. In the very interest of truth and by the dignity of his office the Defender of the Bond must, therefore, be accorded the right to declare, whenever the case requires, that after a diligent, accurate and conscientious examination of the acts he has discovered no reasonable objection to be made against the petition of the Plaintiff or the petitioner.

This fact and this knowledge of not having unconditionally to defend an assigned thesis, but of being instead at the service of the already existing truth, will spare the Defender of the Bond from proposing questions which would be one-sidedly suggestive and circumventive. It will further spare him from exaggeration and from changing possibilities to probabilities, or even to accomplished facts. This will likewise spare him from asserting or fabricating contradictions in cases where a sound judgment would not discern them or would easily resolve them. It will spare him from impugning the veracity of the witnesses, because of discrepancies or inaccuracies in points non-essential or unimportant to the object of the process, discrepancies and inaccuracies which are proven by the psychology of the deposition of the witnesses to be within the sphere of the normal causes of error, but not detracting from the value of the substance of the deposition itself. Finally the realization of his having to serve truth will restrain the Defender of the Bond from demanding new proofs when those already adduced are fully sufficient to establish the truth, a practice which we designated, also on another occasion, as reprehensible.

Nor should it be objected that the Defender of the Bond must write his " animadversiones " not " pro rei veritate " but " pro validitate matrimonii." If by this is meant that the Defender of the Bond must emphasize all that speaks in favor or all that is not opposed to the existence or the continuance of the bond, the observation is indeed accurate. But if, instead, is intended the affirmation that the activity of the Defender of the Bond is not likewise bound to serve the ultimate purpose, viz. the ascertainment of the objective truth, but that he must unconditionally and independently of the proofs and results of the process sustain the imposed thesis of the existence or necessary continuance of the bond, then this assertion must be adjudged as false. Thus all those who participate in the process must without exception direct their efforts toward the sole end " pro rei veritate! "

C. The Promoter of Justice

(c) We would not wish to omit a few brief remarks on what refers to the Promoter of Justice. It can happen that the public welfare requires the declaration of nullity of a marriage and that the Promoter of Justice should present to the competent Tribunal a legal petition for it. At no other point could there be a greater tendency to question the unity of the end and of the collaboration of all cooperating in a matrimonial process than here, where two public officials seem to be in opposition one against the other before the court. The one, the Defender of the Bond, must, by his office, refute what the other, also in virtue of his office, is called upon to promote. And yet precisely at this point are manifest the unity of end and the sole purpose of all tending towards this end. For despite the seeming opposition, both the Defender of the Bond and the Promoter of Justice are presenting to the Judge the same request, that he pronounce a judgment conforming to the truth and to the reality of the same objective fact. A breach of the unity of the end and of collaboration would occur only if the Defender of the Bond and the Promoter of Justice, viewing their respective, immediate and apparently opposing purposes as absolute, were to dissociate and separate them from their proper connection with, and subordination to, the common ultimate purpose.

D. The Advocate

(d) These points are to be studied and pondered with special attention by the advocate. For no one is more apt to lose sight of the unity of purpose and the obligation of the proper subordination of the end in the matrimonial process, than the legal counsel or advocate who assists the plaintiff, or the defendant or the petitioner.

The Advocate assists his client in drafting the preliminary libellus of the case, in determining rightly the object and the basis of the controversy, in exposing the salient points of the matter to be adjudicated. The Advocate points out to his client the proofs to be adduced, and the documents to be produced. He suggests to his client the witnesses to be called in the case, and the peremptory points in the deposition of the witnesses. During the trial, the Advocate assists his client justly to evaluate and to refute the exceptions and the opposite arguments. In a word, the Advocate mar-

shals and emphasizes everything that can be alleged in favor of the petition of his client.

In this manifold activity the Advocate may well exert every effort to win the case of his client. However, in all his activity, he must not withdraw himself from the sole and common final purpose, the discovery, the ascertainment, the legal affirmation of the truth of the objective fact. You eminent jurists and most upright Defenders of the Ecclesiastical Tribunals assembled here today, well know how the knowledge of that subordination must guide the Advocate in his reflections, in his counsels, in his arguments and in his proofs; and you know how this knowledge not only protects him from elaborating factitious suppositions and from accepting cases lacking in every serious basis, from employing fraud and dishonesty, from inducing the parties and the witnesses to testify falsely, from resorting to any other dishonest subterfuge, but also induces him positively to act in the whole series of acts of the process, according to the dictates of conscience. It is necessary that the work of the Advocate as well as that of the Defender of the Bond tend to the supreme triumph of truth in all its radiant splendor. For both of them, even though proceeding from opposite directions because of the different proximate ends, must of necessity tend toward the same final purpose.

From this it is clear what must be thought of the principle unfortunately sometimes affirmed or actually followed: " The Advocate," it is said, " has the right and the duty to effect all that benefits his thesis, just as the Defender of the Bond does in respect to the opposing thesis; for neither of the two does the norm ' Pro rei veritate ' hold! The evaluation of the truth is exclusively the Judge's competency; to burden the Advocate with that task would signify thwarting or even paralyzing all his activity." Such an assertion is based on a theoretical and practical error; it does not recognize the intimate nature and the essential final purpose of the juridical controversy. In matrimonial processes, the juridical controversy cannot be compared to a contest or a tournament in which the two contenders do not have a common final purpose, but in which each one pursues his own particular, absolute aim without respect to, and in fact, in opposition to that of his rival. In other words, each aims to defeat his adversary and carry off the victory. In this case, the winner with his recently won crown of triumph constitutes the ob-

jective fact which is to the Judge of the contest the determining motive for the awarding of the prize, because for him that is the law: To the victor belongs the prize. The juridical contest of a matrimonial process is entirely different; for in this it is not a question of creating a fact with eloquence and dialectics but of rendering evident and giving juridical cognizance to an already existing fact. The above mentioned principle strives to divert the work of the Advocate from the service of the objective truth and in some way would tend to attribute to skillful argumentation the creative force of law, similar to the victorious struggle in a competition.

The same consideration of the unconditioned obligation towards the truth applies even in the case of the simple informative process resulting from a petition for the dissolution of the bond. The instruction of the case in the Ecclesiastical Tribunal does not envision the intervention of a legal protector of the petitioner, but it is the petitioner's natural right to avail himself, on his own behalf, of the advice and assistance of a jurist in the drafting and presenting of the petition, in the choice and presentation of the witnesses, and in meeting the unexpectedly arising difficulties. The legal consultant or advocate can here also employ in favor of his client all his knowledge and skill, but even in this extra-judicial activity he must be mindful of the obligation binding him to the service of the truth, of his submission to the common end, and of the part which he must play in the common effort leading towards the attainment of this end.

From what we have set forth, it appears manifest how in the instruction of marriage cases in the Ecclesiastical Courts, Judge, Defender of the Bond, Promoter of Justice, and Advocate must, as it were, plead a common cause and collaborate, not merging their particular offices, but in conscious deliberate union and submission to the same end.

E. The Parties, the Witnesses, the Experts

(e) It is superfluous to add that the same fundamental law—to investigate, to make clear, give legal cognizance to the truth—binds also the other participants of the process. To assure the attainment of that aim, they are placed under oath. In this subordination to the end they find a clear norm for their internal orientation and for their external action. From it, they derive certainty concerning

their judgment and peace of conscience. It is not permitted to the parties, to the witnesses, or to the experts to fabricate non-existent facts, to attribute an unfounded interpretation to existent ones, or to deny, confuse or obscure these facts. All this would thwart what the law of God and the sworn oath impose: namely, complete dedication to the truth.

The Matrimonial Process in its Ordination and Subordination to the Universal End of the Church—viz. the Salvation of Souls.

3. Keeping in mind what has preceded our thought clearly envisions how the matrimonial process represents a oneness of end and of action in which the individual participants must exercise their special office in reciprocal coordination, and in common direction towards the same end; just like the members of a body all of which have their special function and activity but are at the same time reciprocally coordinated and directed together in the prosecution of the same ultimate purpose which is the ultimate purpose of the entire organism.

This consideration of the intimate nature of the matrimonial process would be incomplete if a glance were not cast also at its exterior aspects.

In the Ecclesiastical Forum the matrimonial process is a function of the juridical life of the Church. In Our Encyclical on the Mystical Body of Christ, we set forth how the so-called " Juridical Church " is truly of Divine origin, but it is not the whole Church, for it represents in some way only the body which must be vivified by the spirit, that is, by the Holy Ghost and His grace. In the same Encyclical we explained also how, in its body and soul, the whole Church is constituted, with regard to the sharing of good and the benefit derived from it, exclusively for the " salvation of souls," according to the words of the Apostle: " For all things are yours." [6] This indicates the superior unity and the higher purpose to which are destined and converge the juridical life of the Church and every juridical function of the Church. It indicates also that the mind, the will, and personal activity must, in this type of work, aim toward the Church's end: the salvation of souls. In other words, the supreme end, the supreme beginning, the supreme unity means only " the care of souls " just as all the work of Christ on earth was the care of souls, and just as the care of souls was and is the entire work of the Church.

[6] I Cor. 3, 22.

But the jurist who, as such, is concerned solely with law and inflexible justice is wont to appear almost instinctively alien to the ideas and the intents of the care of souls, and leans toward a definite cleavage between the two " fora ", the forum of conscience and the forum of the external juridical social living together. This tendency towards a definite separation of the two fields is legitimate up to a certain point, insofar as the pastoral charge is not properly and directly inherent in the office of the Judge and his collaborators in the judicial process. It would be a tragic error, however, to affirm that they are not, in the last and definite instance, in the service of souls, for this would place them in Ecclesiastical judgment outside of the Divinely instituted scope and unity of action of the Church. They would be as corporate members who no longer form part of the whole and who no longer wish to submit and regulate their activity according to the purposes of the complete organic body.

Efficacy of Such Ordination and Subordination in Juridical Activity.

Juridical activity, and especially judiciary activity, has nothing to fear from such regulation and subordination. On the contrary, this activity is vivified and advanced by them. They ensure the necessary breadth of views and of decision, for while the danger of an exaggerated formalism and faithfulness to the letter is always latent within purely unilateral juridical activity, the care of souls guarantees a counter-balance, maintaining alert in the conscience the maxim: " Leges propter homines, et non homines propter leges." (" Laws for the sake of men and not men for the sake of laws.") It is for this reason that we felt obliged on another occasion to warn that in cases where the letter of the law became an obstacle to the attainment of the truth and justice, there must always be open an avenue of recourse to the legislator.

The realization of this subordination to the service of the purpose of the Church also confers upon all the participants in her juridical activity the necessary independence and autonomy before the civil judiciary power. As we pointed out in the above mentioned Encyclical on the Mystical Body of Christ, there exists between the Church and State a profound difference even though the two be perfect societies in the full sense of the word. The Church has its own inherent character of Divine origin and imprint. From

this the juridical life of the Church derives a particular trait all its own, a tending, even in the ultimate results, towards thoughts and goods which are superior, other-worldly, eternal. Therefore, for various reasons it is necessary to consider as an erroneous judgment rather than as an opinion the statement of many persons that the ideal of the practice of Ecclesiastical Law rests in its greatest possible assimilation and conformity with the civil judicial order. This does not exclude, however, the possibility of its (i.e., Ecclesiastical Law) taking opportune advantage of the true progress of science of law even in the civil field.

Finally the realization of the fact of its appurtenance to the superior unity of the Church and the realization of its subordination to the Church's universal purpose the " salus animarum," transmits to the juridical activity the stability to go forward in the sure path of truth and law and protects it from feeble condescension towards the unruly desires of the passions as well as from a hard, unjustified inflexibility. The salvation of souls has for its guide an absolutely secure supreme norm: the law and the will of God. This same law and will of God will guide the handling of the cases submitted to the juridical activity which recognizes and has full realization of having no other purpose than that of the Church. Thus will this juridical activity see confirmed in a superior order what was already its fundamental principle: service and affirmation of the truth in the ascertainment of the true fact and in the application to that fact of the law and the will of God.

We are, therefore, particularly gratified to know that your Sacred Tribunal is unswervingly faithful to such a lofty norm, and can therefore be extolled as an example to the Diocesan Tribunals which look to it as a model and a guide.

May Heaven grant that the new year of the Sacred Roman Rota inaugurated today with the invocation of the Holy Spirit, be also an augury of the inauguration of a new juridical year of peace and justice for the world!

With this prayer we invoke upon you and upon your work the light of the Divine Wisdom, while with all Our Heart we impart to one and to all Our Paternal Apostolic Blessing.

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Pope Pius XII addressed his Encyclical requesting special prayers for peace during the month of May to the world Hierarchy this year instead of to the Cardinal Secretary of State, a post which was vacant due to the death of its last incumbent Luigi Cardinal Maglione.

On June 2, the feast of his patron saint, our Holy Father addressed the College of Cardinals, reviewing the history of Nazism, condemning its teaching and practices, pleading for a peace promoted by an avoidance of the errors of the past, and praising the good will underlying the efforts towards an international organization.

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In 1943, the Oblates of Mary Immaculate were completely cut off from communication with their Superior General, the Very Reverend Theodore Laboure O.M.I., because of war conditions in Italy and France. A special rescript of the Sacred Congregation of Religious on April 11, 1943 appointed the Reverend Anthime Desnoyers O.M.I. as the Vicar General for all the Oblates in America, Africa and Ceylon. His powers were vicarial, not proper.

In 1944 it was learned that the Superior General had died in occupied France. Before his death, however, he had named a Vicar General in accord with the Constitutions, and this was the Very Reverend Hilaire Balmes O.M.I., a Vicar with proper powers.

Since 1940, the Very Reverend Johannes Pietsch O.M.I. has been in Rome, at the Oblate General House, acting as Vicar in war times. Therefore the Oblates now have 3 Vicars General:

One *Ordinary,* Father Balmes O.M.I., first in dignity and universal in the Congregation. But in fact, his jurisdiction does not interfere with the administration of the other two Vicars below.

Two *Extraordinary*

1—Father Pietsch O.M.I. in Rome. Although he has not the title of Vicar General officially, he has all the powers.

2—Father Desnoyers O.M.I. in Montreal. He has the title and full powers, and is assisted by a Council.

SECULAR

In the official proclamation on the end of World War II in Europe made on May 8, the President of the United States set Sunday, May 13, as a day of prayer, calling on the people of the United States to unite in thanksgiving.

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Senator Millard F. Tydings, of Maryland, has inserted in the *Congressional Record* a copy of a resolution opposed to compulsory

military training during peace time sent to the Committee on Military Affairs of the Senate by the Maryland branch of the Catholic Central Verein and the Catholic Women's Union. Similar opposition has been voiced by the directors of the San Francisco Council of Churches. At hearings before the Postwar Military Policy Committee of the House of Representatives of Congress various influential groups have protested against the immediate drafting of peacetime compulsory military service legislation. Among them were the National Congress of Parents and Teachers, claiming a membership of 3,500,000; the Federal Council of Churches of Christ in America; the Brotherhood of Railroad Trainmen; the American Council on Education; the National Association for the Advancement of Colored People; the People's Lobby; the Liberal Party of the State of New York; and the Michigan Council to Oppose Peacetime Military Conscription. Protest for the Catholic hierarchy was contained in a letter of Very Rev. Msgr. Howard J. Carroll, D.D., General Secretary of the National Catholic Welfare Conference.

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On May 21, in a 6-3 decision, the Supreme Court of the United States held that a State may review the validity of a divorce granted in another State under the aspect of the good faith of the party establishing residence for the purpose of suing in the latter State.

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On April 20 at a hearing before the Senate Education and Labor Committee on a bill pending before the Senate providing for federal aid to non-public as well as public schools, Rev. William E. McManus, assistant director of the Department of Education of the National Catholic Welfare Conference, went on record in its favor, as did Edward J. Heffron, Executive Secretary of the National Council of Catholic Men and Miss Ruth Craven, Executive Secretary of the National Council of Catholic Women.

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The Brooklyn Catholic Interracial Council went on record as preferring the Chavez Bill to the Taft Bill in the United States Senate, inasmuch as the former is supplemented by legal enforcement and penalties, while the latter would do little more than provide statistics as to the extent of employment.

For the first time in twenty years, the so-called Equal Rights Amendment was given a favorable report by a Congressional Committee, the House Judiciary Committee, in spite of the opposition of thirty-two of the largest and most important national organizations in the United States, including the National Council of Catholic Women.

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A bill to " repeal certain obsolete laws " in order to permit Sunday amusements other than those already legal passed both houses of the Pennsylvania Assembly, but was recalled for amendment and failed of further action when the Session adjourned on May 7.

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An amendment to the Wisconsin Constitution that would permit the use of public funds for the transportation of school children in parochial and private schools, approved in 1943, is pending for further approval in preparation for an eventual popular referendum.

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A bill that would provide for sterilization of the unfit has been defeated by the Colorado Legislature.

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County Judge Hamilton Ward, Jr. has ruled at Buffalo, N. Y., that when a pastor's home is used frequently for religious services, it is entitled to full tax exemption.

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The Governor of Washington has signed a bill re-instating bus transportation for parochial school pupils. He has vetoed a bill providing for released time.

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The House in New Mexico has defeated a bill permitting religious instruction in public schools; a bill providing subsidy to equalize salaries of teachers in private and public schools was defeated in committee.

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At the Inter-American Conference on problems of war and peace, the sign of the cross was made in the Mexican Chamber of Deputies for the first time in many years by Don Caracciollo Parra Perez, Venezuela's Chancellor.

Chronicle

GENERAL

The Vatican Information Office handled 5,500,725 messages from 1939 to 1944 regarding prisoners of war, internees, and refugees. Since the time of its organization at the beginning of 1944, the Pontifical Committee for Aid to Refugees has distributed 622,350 pounds of food and 500,000 packages of clothing, has provided spiritual assistance in 27 refugee camps throughout Italy and in 24 barracks in Rome alone, and maintains 70 free dispensaries. "The refectories of the Pope", some 200 in number, are expected to spend $200,000 monthly in dispensing food to the needy.

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His Eminence Luigi Cardinal Lavitrano has been appointed Prefect of the Sacred Congregation of Religious.

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The Most Rev. Apostolic Delegate offered Solemn Benediction in St. Patrick's Church, Washington, D. C., in a special V-E Day thanksgiving service.

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Most Rev. Alcide Marina, former Apostolic Delegate to Iran, has been appointed Apostolic Delegate to Turkey, succeeding Most Rev. Angelo Giuseppe Roncalli, the present Apostolic Nuncio to France.

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Our Holy Father has appointed the Very Reverend Joseph Rousseau, O.M.I., as a member of the new special Commission of the Sacred Congregation of Religious in charge of the Houses of Formation of Religious Institutes. Father Rousseau is the Oblate Procurator General at the Holy See, and also an assistant to the Oblate Vicar General for America.

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On April 15 the Administrative Board of the National Catholic Welfare Conference in a further message on peace brought up to date the Bishops' Statement of last November. It warned against Marxism and regarded the solution of the Polish question as disappointing. It criticized the Dumbarton Oaks and Yalta proposals, holding the functions of the general assembly as being too restricted and those of the security council too broad. It called for an international bill of rights and repudiated isolationism.

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The Executive Committee of the Canadian Episcopate on April 24th adopted the statement, "On Organizing World Peace", issued by the Administrative Board of the National Catholic Welfare Conference on April 15th, and forwarded the statement to Prime Minister King and the Canadian delegation attending the San Francisco Conference on International Organization.

A letter of the Executive Committee of the Canadian Episcopate designated June 10 as the date for a collection throughout Canada in the interests of the Pontifical Assistance of War Victims.

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The Bishops War Emergency and Relief Committee has sent 500 cases of Mass wine and 175 sacks of flour to the Catholic Welfare Organization of the Philippine Islands.

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Pope Pius XII, on learning of the death of the late President of the United States, Franklin D. Roosevelt, dispatched a telegram of condolence to Mrs. Roosevelt and sent a message to the new President.

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Twelve Cardinals, and numerous military and civilian leaders, attended the services at the American Church of Santa Susanna on April 15, as a solemn ceremony of propitiation for the American nation.

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As a memorial to the late President, a Solemn Mass was celebrated in St. Patrick's Cathedral, New York, at which Most Rev. Francis J. Spellman, D.D., Archbishop of New York, presided.

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A Solemn Mass in memory of the late President was celebrated in St. Mary's Cathedral, Sydney, Australia, at which the Most Rev. Giovanni Panico, Apostolic Delegate, presided, and at which Most Rev. Norman Gilroy, D.D., Archbishop of Sydney, was present.

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In tribute to the memory of the late President, the Dail Eireann, adjourned after Premier Eamon de Valera and leaders of all political parties had expressed their profound esteem for him.

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The late President Franklin D. Roosevelt has been honored posthumously by the University of Louvain with the honorary degree of Doctor of Laws.

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Most Rev. Michael J. Ready, D.D., Bishop of Columbus, preached the sermon at the Seventh Annual Memorial Military Mass for the War Dead celebrated on May 27 in the amphitheater of Arlington National Cemetery. Rev. James A. Magner, Procurator of The Catholic University of America, was celebrant of the Solemn Mass.

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On April 11, National Catholic Welfare Conference News Service observed the twenty-fifth anniversity of its first news dispatches.

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On April 15, the Confraternity of Christian Doctrine observed the 40th anniversary of Pope Pius X's Encyclical, *Acerbo nimis,* on the teaching of Christian Doctrine.

On April 28 Most Rev. John G. Murray, D.D., Archbishop of St. Paul, observed the silver jubilee of his consecration as a bishop.

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Most Rev. George L. Leech, J.C.D., D.D., observed the twenty-fifth anniversary of his ordination on May 25.

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Rt. Rev. Msgr. Francis J. Brennan, an auditor of the Sacred Roman Rota since October 1940, celebrated the twenty-fifth anniversary of his ordination.

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Most Rev. Richard T. Guilfoyle, D.D., Bishop of Altoona, celebrated a Pontifical Mass of Thanksgiving on May 10 to mark the diamond jubilee of the Pennsylvania foundation of the Sisters of Charity (Greensburg Mother House) and their seventy-five years of service to the Cathedral parish.

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Most Rev. George J. Rehring, D.D., Auxiliary Bishop of Cincinnati, offered the Solemn Pontifical Mass at the Mother House of the Ursuline Nuns, celebrating the centenary of the establishment of the community in the Archdiocese of Cincinnati.

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Rt. Rev. Msgr. William J. Keuenhof, former Chancellor and Vicar General of the Diocese of Kansas City, celebrated the fiftieth anniversary of his ordination.

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199 lawyers met at the invitation of Very Rev. Patrick J. Halloran, S.J., President of St. Louis University, in a panel discussion of principles of ecclesiastical practice of Catholic attorneys and judges and considered the formation of a permanent organization of lawyers for the study of canon law in civil action involving marriage problems.

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Dr. Francis C. Sullivan, member and past president of the St. Louis Board of Education, in an address to the St. Louis Educators' Guild, voiced strong opposition to sex instruction in public schools.

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75 years ago, on April 24, the Vatican Council's "Dogmatic Decree on Catholic Faith" was confirmed and promulgated.

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Most Rev. Joseph R. Crimont, S.J., D.D., Vicar Apostolic of Alaska, died at the age of 87 at Juneau.

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Most Rev. James Paul McCloskey, D.D., Bishop of Jaro, Philippine Islands, died April 9 at the age of 76. He became Bishop of Zamboanga in 1917 and was transferred to the See of Jaro in 1920.

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Most Rev. Marius Besson, Bishop of Fribourg, Lausanne and Geneva, died of heart failure on February 24.

Most Rev. Enrique Murao, Bishop of Cafelandia, Brazil, since 1935, former Bishop of Campos, Brazil, died at the age of 67.

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Most Rev. Nicolas Tijerino y Loaciga, Bishop of Leon, Nicaragua, since 1922, died at the age of 63.

DIGNITIES

Most Rev. Peter L. Ireton, D.D., succeeds as Bishop of Richmond, Most Rev. Andrew J. Brennan, D.D., who has resigned.

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Most Rev. Henry O'Brien, D.D., Auxiliary Bishop of Hartford since 1944, has been named Bishop of that See.

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Most Rev. John K. Mussio, J.C.D., D.D., was consecrated on May 1 by Most Rev. John T. McNicholas, O.P., S.T.M., Archbishop of Cincinnati, in St. Monica's Cathedral, Cincinnati, and was installed first Bishop of Steubenville on May 23, in Holy Name Church, Steubenville.

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On May 26 Most Rev. Francis J. Schenk, J.C.D., D.D., Bishop of Crookston, and Most Rev. James L. Connolly, D.D., Coadjutor to the Bishop of Fall River, were consecrated in a joint ceremony in the Cathedral of St. Paul, St. Paul, Minnesota, by Most Rev. John G. Murray, D.D., Archbishop of St. Paul. Bishop Schenk was installed on May 30, and Bishop Connolly was inducted on June 7.

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On May 15 Most Rev. Vincent S. Waters, D.D., was consecrated third Bishop of Raleigh in Sacred Heart Cathedral, Richmond, Virginia, by Most Rev. Peter L. Ireton, D.D., Bishop of Richmond. The co-consecrators were Most Rev. Emmet M. Walsh, D. D., Bishop of Charleston, and Most Rev. Gerald P. O'Hara, D.D., Bishop of Savannah-Atlanta.

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Most Rev. Louis F. Kelleher, D.D., has been named Titular Bishop of Thenae and Auxiliary to Most Rev. Richard J. Cushing, D.D., Archbishop of Boston.

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Maj. Gen. William R. Arnold, former Chief of Army Chaplains and Assistant Inspector General of the Army with reference to religious matters, has been named Titular Bishop of Phocaea and Delegate of the Military Ordinariate.

Most Rev. William J. Hafey, D.D., Bishop of Scranton, has been named Assistant at the Pontifical Throne.

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The resignation of Most Rev. Charles L. Nelligan, Bishop of Pembroke, and former Military Ordinary for the Canadian Armed Forces, has been accepted by the Holy See, and his successor is Most Rev. William Smith, of St. Columban's, Cornwall.

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The following priests laboring in Italy for War Relief Services National Catholic Welfare Conference have been made Domestic Prelates: Rt. Revs. John P. Boland, Thomas F. Markham, Caesar M. Rinaldi, and Andrew P. Landi.

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Five members of the Pontifical College Josephinum have been made Papal Chamberlains, viz., Very Revs. Adrian F. Brandhoff, Adalbert W. Centner, Albert Brener, Richard B. Bean, and Leo F. Miller.

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Most Rev. Edward G. Hettinger, D.D., Auxiliary Bishop of Columbus, has been appointed Vicar General of the Diocese of Columbus, and Rt. Rev. Msgr. Joseph R. Casey has been named Chancellor. Both prelates served in the same capacity under the predecessor of Most Rev. Michael J. Ready, D.D., Bishop of Columbus.

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Rev. Alphonse M. Schwitalla, S.J., President of the Catholic Hospital Association, has become Moderator of the Federation of Catholic Physicians' Guilds and editor of the Federation's journal, the Linacre Quarterly.

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Rev. Carroll O'Sullivan, S.J., has been appointed rector of the University of San Francisco. The former rector, Very Rev. William J. Dunne, S.J., who held the position since 1938, continues as president.

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Mrs. John W. McCormack, wife of Congressman McCormack, majority leader of the House of Representatives, has been given the medal "Pro Ecclesia et Pontifice," for her support of the work of Most Rev. Paul Yu Pin, D.D., Vicar Apostolic of Nanking.

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Dr. George N. Shuster, President of Hunter College, has been re-elected President of the Catholic Association for International Peace.

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Edward D. McKim, of Omaha, has been appointed chief administrative assistant to the President of the United States.

UNIVERSITY

The Fifty-sixth Annual Commencement of the University was observed on Wednesday, May twenty-third. The program was as follows:

Order of Exercises

The Most Rev. Peter L. Ireton, D.D., Bishop of Richmond
and Secretary of the Board of Trustees, Presiding

Processional—University Grand March—
Edwin Franko Goldman.....U. S. Navy School of Music Band *

*Lt. (j.g.) James M. Thurmond, Officer in Charge, John B. Paul, Mus. 1/c., Conducting.

The Star Spangled Banner.....U. S. Navy School of Music Band

Invocation .....Bishop Ireton

Announcements .....The Rector of the University

Recognition of the Deans of the
Schools of the University.....The Vice Rector of the University

Conferring of Degrees in Course:
The School of Social Science
The School of Nursing Education
The School of Social Work
The School of Engineering and Architecture
The Catholic Sisters College
The College of Arts and Sciences
The Graduate School of Arts and Sciences
The School of Law
The School of Philosophy
The School of Canon Law
The School of Sacred Theology

Address .....The Honorable Francis J. Myers,
U. S. Senator from Pennsylvania

"Consider and Hear Me"—
Alfred Wooler .....Glenn Burris, Mus. 3/c, U. S. N. R.

Valedictory .....Andrew L. Gaboriault

Alma Mater .....U. S. Navy School of Music Band

Benediction .....Bishop Ireton

Recessional—Huldigung's Marsch
from Sigurd Jor Falfar Suite—
Edward Grieg .....U. S. Navy School of Music Band

The School of Canon Law

Very Reverend H. Louis Motry, S.T.D., J.C.D., Dean

Bachelor in Canon Law

Rev. Francis J. Callahan, S.J. .....St. Marys, Kans.
Rev. James F. Claffey .....Salt Lake City, Utah

Rev. Matthew Michael Crotty .....Baker City, Oreg.
Rev. George Eagleton .....Reno, Nev.
Rev. Francis Philip Furlong, S.J.....San Francisco, Calif.
Rev. Marion L. Gibbons, C.M. .....Washington, D. C.
Rev. Robert A. Hodges .....Kansas City, Mo.
Rev. Henry L. Hoffman .....Trier, Germany
Rev. Bernard M. Kelly .....Providence, R. I.
Rev. Thomas John Kilcullen .....Scranton, Pa.
Rev. Joseph George Konrad .....Brooklyn, N. Y.
Rev. Germain Joseph Lefontaine, W.F. .....Bethesda, Md.
Rev. Loras T. Lane .....Dubuque, Iowa
Rev. Martin N. Lohmuller .....Philadelphia, Pa.
Rev. James F. Lover, C.Ss.R. .....Washington, D. C.
Rev. Joseph F. Lynn, O.S.F.S. .....Washington, D. C.
Rev. Edward Anthony McCarthy .....Cincinnati, Ohio
Rev. Timothy J. McNicholas .....Cincinnati, Ohio
Rev. Joseph Marositz, M.S.C. .....Shelby, Ohio
Rev. Francis J. Murphy .....Raleigh, N. C.
Rev. Romaeus O'Brien, O.Carm. .....Washington, D. C.
Rev. Benedict Pfaller, O.S.B. .....Richardton, N. D.
Rev. Alphonse S. Popek .....Milwaukee, Wis.
Rev. Bernard Joseph Ristuccia, C.M. .....Washington, D. C.
Rev. Nathaniel Sonntag, O.F.M.Cap. .....Marathon, Wis.
Rev. Joseph Stadler .....San Diego, Calif.
Rev. Ira Richard Still .....Cleveland, Ohio
Rev. Ignatius J. Strecker .....Wichita, Kans.
Rev. Ignatius Szal .....Philadelphia, Pa.

LICENTIATE IN CANON LAW

Rev. Warren Louis Boudreaux, J.C.B. .....Lafayette, La.
Rev. Thomas Joseph Bowe, J.C.B. .....San Francisco, Calif.
*Rev. Christopher Timothy Clark, J.C.B. .....Newark, N. J.
Rev. Edward Joseph Corrigan, S.M., J.C.B. .....Washington, D. C.
Rev. Michael Ferdinand Diederichs, S.C.J., J.C.B...Washington, D. C.
Rev. Maurice John Dingman, J.C.B. .....Davenport, Iowa
Rev. Joseph C. Goracy, J.C.B. .....Wichita, Kans.
Rev. Joseph Francis Hale, J.C.B. .....Winona, Minn.
Rev. Joseph Arthur Henry, J.C.B. .....Philadelphia, Pa.
Rev. Herbert Linenberger, C.PP.S., J.C.B. .....Carthagena, Ohio
Rev. James Martin Lowry, J.C.B. .....Scranton, Pa.
Rev. George Edward Lynch, J.C.B. .....Raleigh, N. C.
Rev. Timothy Aloysius Lynch, M.S.SS.T., J.C.B....Silver Spring, Md.
Rev. Justin David McClunn, J.C.B. .....Richmond, Va.
Rev. Thomas Joseph McGarvey, J.C.B. .....Philadelphia, Pa.
Rev. James McGrath, J.C.B. .....Philadelphia, Pa.
Rev. Joseph Francis Marbach, J.C.B. .....New York, N. Y.

* Work completed November, 1944.

Rev. John Edward Metz, J.C.B. .....Harrisburg, Pa.
Rev. Thomas Francis O'Donovan, J.C.B. .....Saint Augustine, Fla.
Rev. Juan Ortega-Uhink, S.J., J.C.B. .....Mexico City, Mexico
Rev. Bernard Aloysius Shimkus, J.C.B. .....Philadelphia, Pa.
Rev. Matthias Edward Siedlicki, J.C.B. .....Harrisburg, Pa.
Rev. Vincent Michael Smith, J.C.B. .....Philadelphia, Pa.
Rev. Paul Anthony Wachtrle, J.C.B. .....Grand Island, Nebr.

DOCTOR OF CANON LAW

Rev. Ralph Francis Balzer, C.P., J.C.L. .....Union City, N. J.
Dissertation: *The Computation of Time in a Canonical Novitiate.*

Rev. John Whelan Dougherty, J.C.L. .....Philadelphia, Pa.
Dissertation: *De Inquisitione Speciali.*

Rev. Michael Walter Dziob, J.C.L. .....Providence, R. I.
Dissertation: *The Sacred Congregation for the Oriental Church.*

Rev. John Albert Eidenschink, O.S.B., J.C.L. .....Collegeville, Minn.
Dissertation: *The Election of Bishops in the Letters of Pope Gregory the Great.*

Rev. Nicholas Gill, C.P., J.C.L. .....Union City, N. J.
Dissertation: *The Spiritual Prefect in Clerical Religious Houses of of Study.*

Rev. Harry Gerard Hynes, J.C.L. .....Philadelphia, Pa.
Dissertation: *The Privileges of Cardinals.*

Rev. Gerald Vincent McDevitt, J.C.L. .....Philadelphia, Pa.
Dissertation: *The Renunciation of an Ecclesiastical Office.*

Rev. Joseph Leroy Manning, J.C.L. .....San Antonio, Texas
Dissertation: *The Free Conferral of Offices.*

Rev. Louis G. Meyer, O.S.B., J.C.L. .....Conception, Mo.
Dissertation: *Alms-gathering by Religious.*

Rev. Cletus Francis O'Donnell, J.C.L. .....Chicago, Ill.
Dissertation: *The Marriages of Minors.*

Rev. Joseph Prunskis, J.C.L. .....Chicago, Ill.
Dissertation: *Comparative Law, Ecclesiastical and Civil, in the Lithuanian Concordat.*

Rev. Francis Patrick Sweeney, C.Ss.R., J.C.L. .....Washington, D. C.
Dissertation: *The Reduction of Clerics to the Lay State.*

Rev. Henry John Vogelpohl, J.C.L. .....Cincinnati, Ohio
Dissertation: *The Simple Impediments to Holy Orders.*

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Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, has been appointed a member of the Pontifical Commission for the Sacred Sciences at the University, succeeding Most Rev. John A. Duffy, D.D., late Bishop of Buffalo.

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The Right Reverend Rector addressed the Catholic Nurses League of the Diocese of Pittsburgh at their annual Communion Breakfast on May 13.

Richard J. Hurley, professor of library science at the University has been elected President of the Catholic Library Association, succeeding Rev. Andrew L. Bouwhuis, S.J.

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Dr. Herbert Wright, a member of the University Faculty since 1930, and internationally known for his writing, died on April 12, at the age of 53.

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THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. Date: April 9, 1945.

Title: The Democratic Spirit of the Common Law and of the Roman Law.

Author: Robert Neuner, J.U.D., formerly Professor of Roman and Civil Law at the University of Prague.

Abstract: An analysis of the question whether it is possible to distinguish between the spirit of the law and the spirit of the people among whom the law prevails. In the last resort, all manifestations of the culture of a people are interrelated, but a distinction can be made by tracing the various rules and institutions back to their sources: political reform or gradual development by the legal profession. In the light of this distinction the origin of the various institutions which are regarded as a bulwark of human liberty may be analyzed (*habeas corpus,* due process, fair trial, etc.). The Roman law of the late republic and the Common law coincide to a surprisingly large extent and in both systems the most important of the safeguards of liberty are due to political action and legislative reform. But many minor safeguards have been developed by the legal profession upon their own initiative.

II. The final conference of the Seminar for 1944-1945 was held at The Catholic University Law School in the St. Thomas More Law Library, McMahon Hall, on Thursday, May 3. The program of exercises was as follows:

Roman and Comparative Law in the Americas after the War, by Gordon Ireland, J.S.D., The Catholic University of America School of Law.

Significance of Comparative Law, by Joseph Dainow, B.C.L., S.J.D., Louisiana State University; Major, Army of the United States, Office of the Judge Advocate General.

The Federal Prosecutor, by Edward M. Curran, A.B., LL.B., United States Attorney, District of Columbia.

The Judicial Function of the Municipal Court of Appeals for the District of Columbia, by William E. Richardson, LL.B., LL.M., M.P.L., Chief Judge, Municipal Court of Appeals for the District of Columbia.

Presentation of Appellate Court Competition Awards and Trust Law Prizes, by Frank Murphy, LL.B., LL.D., Associate Justice, Supreme Court of the United States.